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THE INDIAN LAW REPORTS.

ALLAHABAD SERIES.

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

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VOL. XII.

1890.

ALLAHABAD:

PRINTED AT THE GOVERNMENT PRESS,

AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,

UNDER THE AUTHORITY OF THE GOVERNOR-GENERAL IN COUNCIL

Price Re. 1.

JUDGES OF THE HIGH COURT.

CHIEF JUSTICE:

HON'BLE SIR JOHN EDGE, *Kt.*

PUISNE JUDGES:

HON'BLE DOUGLAS STRAIGHT.

" M. BRODHURST (*Died October 24th*, 1890.)

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THE

INDIAN LAW REPORTS,

Allahabad Series.

FULL BENCH.

1889
April 2.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

THE COLLECTOR OF GORAKHPUR AND ANOTHER (DEFENDANTS) *v.* PALAKDHARI SINGH (PLAINTIFF).

Act I of 1872 *(Evidence Act), ss.* 8, 9, 13, 40, 43—*Admissibility in evidence of judgments not* inter partes—*Judgment in criminal case.*

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P brought a suit against *K*, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to *K's* husband, and to have it decreed that her husband died childless, and that *K* had falsely put forward a child of unknown parentage as her husband's son. *K* was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance, and by the High Court on appeal. After *K's* death *P* brought a suit against *D*, whom the Collector as Manager of the Court of Wards had accepted as the minor son of *K*, and against the Collector as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit.

Held by the Full Bench that the judgments of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (BRODHURST, J., dissenting on this point) that they were admissible in evidence in the present suit.

Per EDGE, C. J., and TYRRELL, J.—The judgments were not admissible under s. 8 or s. 9 of the Evidence Act (I of 1872), nor was either of them a "transaction" or a "fact" within the meaning of s. 13. But the record, and not the judgments alone, in the former suit, was admissible under s. 13*(b)*, independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed, the word "right" in both clauses *(a)* and *(b)* of s. 13 including a right of ownership, and not being confined, as

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held by the majority in *Gujju Lall* v. *Fatteh Lall* (1), to incorporeal rights. But the reasons given in the judgments in the former suit for the decree could not be considered in the present suit.

Per STRAIGHT, J.—Under s. 43 of the Evidence Act the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provision of the Act. Here the question was not as to the *existence* of the former judgments and decrees as a fact in issue or relevant fact; but though s. 43 declared judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 irrelevant *qud* judgments, orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees were not themselves a "transaction" or "instances" within the meaning of s. 13; but the suit in which they were made was a transaction or an instance in which the defendant's right as the living son of *K's* husband to obtain proprietary possession of his father's estate was claimed and recognised, and to establish that such a transaction or instance took place, they were the best evidence.

Per BRODHURST, J.—That for the reasons given by Garth, C. J., and Jackson and Pontifex, JJ., in *Gujju Lall* v. *Fatteh Lall* (1), the judgments in the former suit were not admissible in evidence.

Per MAHMOOD, J.—That for the reasons given in the dissentient judgment of Mitter, J., in *Gujju Lall* v. *Fatteh Lall* (1), the former judgment of the High Court was admissible in evidence.

It having been alleged that the defendant was in reality one *R*, the defence attempted to use as evidence a judgment in a criminal case in which the defendant was prosecuted as *R* for causing simple hurt, and in which the Court had found that *R* had died some time before the date of the alleged offence, and expressed an opinion that the present plaintiff (who was not the prosecutor) had got up the case.

Held by EDGE, C. J., and BRODHURST and TYRRELL, JJ., that the judgment of the criminal Court was not admissible in evidence.

Held by STRAIGHT, J., with doubt, and on the principle that in cases of doubt a Judge should decide in favour of admissibility rather than of non-admissibility, that the judgment was a fact which went to establish the identity of the defendant with the person he alleged himself to be, or at any rate to show that he was not the person the plaintiff said he was, and that it was therefore admissible under s. 9 of the Evidence Act.

Held by MAHMOOD, J., that the judgment was admissible under s. 8 and, if not, under other sections of the Evidence Act.

THE facts of this case were as follows. One Hanuman Singh, who died on the 24th May, 1872, was formerly owner of the pro-

(1) I. L. R. 6 Calc., 171.

perty in suit, certain villages in the district of Gorakhpur; and he left a widow, Musammat Pan Kuar, who obtained possession of his estate. She also obtained from the civil Court of the district a certificate of guardianship of a minor named Dalip Narain Singh, whom she alleged to be her son by the deceased Hanuman Singh, and to have been born on the 31st January, 1873.

On the 9th June, 1873, the plaintiff, Palakdhari Singh, who was first cousin to Hanuman Singh, instituted a suit against Pan Kuar in the Court of the Subordinate Judge of Gorakhpur. The object of the suit was to establish the plaintiff's right of inheritance to the villages which had belonged to Hanuman Singh, and to have it declared that Hanuman Singh died childless, and that the defendant Pan Kuar had falsely put forward a child of unknown parentage as Hanuman Singh's son. The defendant maintained that Dalip Narain Singh was her son by the deceased Hanuman Singh.

On the 23rd January, 1874, the Subordinate Judge dismissed the suit on the ground that the plaintiff had not satisfactorily proved his allegation that Dalip Narain Singh had been falsely put forward as the son of Hanuman Singh. From this decision the plaintiff appealed to the High Court. On the 7th December, 1874, the High Court (Turner and Brodhurst, JJ.,) dismissed the appeal, concurring with the conclusions drawn from the evidence by the Subordinate Judge.

Musammat Pan Kuar died in October, 1879. After her death the plaintiff Palakdhari Singh applied for a certificate of guardianship of the minor, empowering him to manage the property, under Act XL of 1858. Ultimately, however, this application was struck off, and in July, 1880, the property was placed under the management of the Court of Wards. At that time claims were put forward on behalf of two different boys to be Dalip Narain Singh, the son of Hanuman Singh. Inquiries were made by the Collector, and he eventually accepted as Dalip Narain Singh, and as heir to Hanuman Singh, the minor whose claim was put forward by Rukmani Sewak Singh, a cousin of Musammat Pan Kuar.

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This led to the present suit, which was instituted in the Court of the Subordinate Judge of Gorakhpur by Palakdhari Singh, on the 15th September, 1886. The reliefs claimed by the plaintiff were :—" 1. That by ejectment of the defendant, the plaintiff may be put in the possession of the property specified below," *i.e.*, the villages left by Hanuman Singh. " 2. That it may be declared that the defendant is not the genuine Dalip Narain Singh." He alleged in his plaint that Hanuman Singh had died childless, that Musammat Pan Kuar had falsely alleged Dalip Narain Singh to be her son by Hanuman Singh, and that moreover the boy whom the Collector had accepted as Dalip Narain Singh was not so in fact, but Dalip Narain Singh, whose parentage was in question in the suit of 1874, was dead. He alleged further that the boy who had been accepted was in reality one Radha Kishen, son of Nar Singh Sewak, a first cousin of Musammat Pan Kuar. The defendants to the suit were described as " the Collector of Gorakhpur, as Manager on the part of the Court of Wards of the Bansgaon estate, and Radha Kishen, who calls himself Dalip Narain Singh, under the guardianship of the Collector."

The issues fixed by the Subordinate Judge were :—" 1. Whether the defendant in the present case is the same Dalip Narain Singh whom Pan Kuar, widow of Hanuman Singh, had alleged to have been born of her, or whether he is dead and the defendant in this case is in reality Radha Kishen, son of Nar Singh Sewak. 2. If the first part of the above issue is proved, is the present suit barred as *res judicata?* 3. Whether, after the death of Hanuman Singh, any son was born of Musammat Pan Kuar, or not?"

The allegation that the minor defendant was not Dalip Narain Singh, but Radha Kishen, was met by the defence with the allegation that Radha Kishen was dead. In support of this statement, a judgment of the Deputy Magistrate of Azamgarh, dated the 31st March, 1884, was put in and was treated by the Subordinate Judge as evidence. It related to a charge brought by one Musammat Sheoraj Kuari of causing simple hurt under s. 323 of the Penal Code, against the defendant as Radha Kishen, son of Nar Singh Sewak, and one Ramanuj Sewak. The Deputy Magistrate in that case

found that Radha Kishen had died before the alleged assault took place. In the course of his judgment he observed:—"Babu Palakdhari Singh has taken a deep interest in this case, and I have a strong conviction that it is he who is moving in the background, and that Sheoraj Kuari is simply an instrument in his hands, playing the part set by him. Babu Palakdhari Singh's interest will be clearly seen when it is remembered that he would inherit a large landed estate if it were established that the boy in existence is not Dalip Narain, son of Musammat Pan Kuar, but Radha Kishen, son of Nar Singh Sewak. It was to obtain a declaration that the boy is Radha Kishen that the present complaint has been brought."

In the present case the Subordinate Judge found that the plaintiff had proved the allegations contained in the plaint, that the minor defendant was Radha Kishen, the son of Nar Singh Sewak, and that the boy whose parentage was in question in the suit of 1874 was not the same person as the present minor defendant.

In regard to the effect of the judgments of the Subordinate Judge and of the High Court, the Court held that, inasmuch as it had been found that the present defendant was not Dalip Narain Singh, no question of *res judicata* could arise, but that even if he were the same person as the minor whose parentage was in issue in the former suit, the present suit would not be barred, inasmuch as the parties in the two suits were different, and the present defendant could not be regarded as claiming under Musammat Pan Kuar. Upon the third issue the Court observed:—"It is proved that the boy who is really referred to in this case is Radha Kishen, and not Dalip Narain. Regarding the boy who was held to be the son of Pan Kuar, the plaintiff cannot say more than this, that he is dead or has been concealed. It is impossible to draw from the entire evidence produced in this case the conclusion that any son was born of Pan Kuar."

The Court accordingly decreed the claim.

The defendants appealed to the High Court. Their first ground of appeal was:—"Because with reference to s. 13 of the Code of

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Civil Procedure, it was illegal for the lower Court to try the first and third issues framed by the Court."

The appeal came for hearing before Straight and Mahmood, JJ., who made the following order of reference to the Full Bench —

STRAIGHT, J.—A question has arisen in the course of the hearing of this appeal as to the admissibility of certain evidence under the following circumstances :—

The plaintiff-respondent in the present suit alleged in his plaint that one Musammat Pan Kuar, the wife of one Hanuman Singh, who died in the year 1872, was never pregnant by her husband, nor did she give birth to a son born to him, subsequent to the date of his death. It is unnecessary for me to go into the other questions which arise out of the plaint and the statement of defence; but the primary point put forward in the judgment which is under appeal and by the learned counsel for the plaintiff-respondent, is that Musammat Pan Kuar never gave birth to a child. In reference to this question, we have had our attention called by Mr. *Ross*, the learned counsel on behalf of the appellant, to a judgment of this Court delivered upon the 7th December, 1874, in a suit in which the present plaintiff-respondent was the plaintiff, and Musammat Pan Kuar was the defendant, and the object of that suit was to have it declared that Musammat Pan Kuar had not, as alleged by her, given birth to a child in the month of January, 1873, subsequent to the death of her husband, Hanuman Prasad Singh. It is objected by Mr. *Conlan*, on behalf of the respondent-plaintiff, that this judgment is wholly inadmissible, and that neither this Court nor any Court in the trial of the present litigation has any right to refer to it for the purpose of treating it as evidence of the fact of whether Pan Kuar had or had not a child in the month of January, 1873. In support of Mr. *Conlan's* contention, which was fully argued on the plaintiff-respondent's side by Mr. *Sundar Lal*, two Full Bench Rulings of the Calcutta High Court were referred to, the first of which is *Gujju Lall* v. *Fatteh Lall* (1), and the second which follows and adopts the ruling I have referred to is

(1) I. L. R., 6 Calc., 171.

Surender Nath Pal Chowdhry v. *Brojo Nath Pal Chowdhry* (1). There is also a ruling of the Bombay High Court *Ranchhoddas Krishnadas* v. *Bapu Narhar* (2) which adopts a similar view. Mr. *Conlan* has very frankly stated that if it is held that the ruling of the Calcutta High Court is an erroneous one, then he would not further contest the question as to the fact that Musammat Pan Kuar had a child, and consequently a great deal of our time would be spared from a discussion of that question. I have had the opportunity of consulting the learned Chief Justice with reference to the difficulty that has arisen. He agrees with my brother Mahmood and myself that it would be out of respect to the rulings of the Full Bench of the Calcutta High Court that this question should be considered by a Full Bench of this Court, and he has intimated to me further that he approves my suggestion that this matter should be dealt with tomorrow morning at a sitting of the Full Bench. I have already indicated what the point is that arises with regard to the admissibility of the judgment of this Court of the 7th December, 1874, and of the Subordinate Judge from which appeal was preferred. But a question also arises in this case which may as well be considered at the time of this reference being taken up, *viz.*, whether a judgment of the 31st March, 1884, delivered by Pandit Sundar Lal, Deputy Magistrate, upon a charge against Ramanuj and Radha Kishen is admissible in the present trial as evidence to show that in the year 1884 the plaintiff was taking certain steps through the instrumentality of a nominal prosecution to make it appear that one Radha Kishen was then living at the date of the alleged assault with which that judgment dealt.

The questions above stated are referred to the Full Bench for its opinion.

MAHMOOD, J.—I agree in the order made by my learned brother.

Mr. *G. E. A. Ross* and Munshi *Ram Prasad*, for the appellants.

The Hon. *T. Conlan*, Pandit *Sundar Lal* and Munshi *Juala Prasad*, for the respondent.

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Mr. *G. E. A. Ross*, for the appellants:—The judgment of the Subordinate Judge dated the 23rd January, 1874, and that of the High Court dated the 7th December, 1874, are admissible in evidence in this case. I contend, in the first place, that they operate as *res judicata*. The question at issue in the former suit was whether the plaintiff or Dalip Narain Singh was entitled to succeed to the estate of Hanuman Singh, and whether Hanuman Singh died childless or had a son. In that suit Pan Kuar was in reality sued as representing her son. Between them they represented the whole estate of Hanuman Singh. The defendant ought to have been formally made a party to the former suit. His mother was merely a defendant as representing him. Substantially he was a party to that suit. If the former suit had been brought against Hanuman Singh for a declaration that the defendant was not his legitimate son, the present suit would clearly be barred. The present position is practically the same. There is a substantial identity of parties, and the matter is therefore *res judicata* and the judgments are admissible under s. 40 of the Evidence Act. In determining the question of *res judicata* the substance of the two suits and of the causes of action must be looked to. This was held, with reference to s. 2 of Act VIII of 1859, by the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (1), and it is applicable to s. 13 of the present Code of Civil Procedure.

[MAHMOOD, J.—The former suit was not framed as against Pan Kuar as guardian of her son, or as representing him. No such allegation was made.]

In the second place the judgments in the former suit, if not operating as *res judicata*, are admissible in evidence under s. 43 of the Evidence Act. I rely on the judgment of Mitter, J., in *Gujju Lall* v. *Fatteh Lall* (2). The reasoning of the majority of the Full Bench in that case is not applicable to the circumstances of the present case. Here s. 9 of the Evidence Act is applicable: the judgments and decrees of 1874 are relevant under that section within the words "which establish the identity of any thing or

(1) I. L. R., 11 Calc., at pp. 307-8. (2) I. L. R., 6 Calc., 171.

person whose identity is relevant." The question is whether the defendant is the son of Hanuman Singh or a mere changeling, and this is a question of identity.

[EDGE, C.J.—The judgments may have established the parentage of Dalip Narain Singh, but that is not a question of "identity."]

S. 11 of the Evidence Act is also applicable.

The judgments are also admissible under s. 13. They constitute a "transaction" within the meaning of that section. See *Naranji Bhikabhai* v. *Dipa Umed* (1).

[EDGE, C. J.—What is the right "claimed" or "denied" here?]

The plaintiff's right to succeed to Hanuman Singh's estate if there is no son of Hanuman Singh living, and the defendant's right as legitimate son of Hanuman Singh. [He referred to *Neamut Ali* v. *Gooroo Doss* (2), *Gurdayal Mal* v. *Jhandu Mal* (3), *Ganga Nand* v. *Balgobind Das* (4), *Surender Nath Pal* v. *Brojo Nath Pal Chowdhry* (5), *Hira Lal Pal* v. *Hills* (6).]

The Hon. *T. Conlan*, for the respondent:—The question as to *res judicata* has not been referred to the Full Bench. The only question is whether these judgments have been properly admitted in evidence. Further, s. 40 of the Evidence Act refers only to suits; it says nothing about particular issues.

[EDGE, C. J.—We are all agreed that the judgments do not fall within s. 40.]

The present defendant was not a party to the suit of 1874, which was brought against Pan Kuar alone. In that suit she did not represent him in any sense. There is no mutuality, and the judgments are therefore inadmissible. [He referred to the following authorities:—*Gujju Lall* v. *Fatteh Lall* (7), *Kanhya Lall* v. *Radha Churn* (8), *The Baroness Wenman* v. *Mackenzie* (9), *Hira Singh*

(1) I. L. R., 3 Bom. 3.
(2) 22 W. R., 365.
(3) Weekly Notes, 1888, p. 242.
(4) Weekly Notes, 1884, p. 61
(5) I. L. R., 13 Calc., 352.
(6) 11 Calc., L. R., 528.
(7) I. L. R., 6 Calc., 171.
(8) 7 W. R., 338.
(9) 5 H. & B. 447.

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v. *Ganga Sahai* (1), *Ganga Sahai* v. *Hira Singh* (2), *Gangadhur Roy* v. *Umasoonderi Dossee* (3), *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (4), *Muhammad Ali* v. *Shurum Ali* (5), *Lalla Mahadeo Dyal Singh* v. *Chundee Pershad* (6), *Ram Narain Rai* v. *Ram Coomar Chunder Poddar* (7), *Mohendra Lal Khan* v. *Rosomoyi Das* (8), and Taylor on Evidence (8th ed.), ss. 1480, 1495, 1497.]

Mr. *G. E. A. Ross*, for the appellants, in reply.

EDGE, C.J.—In this suit the plaintiff claims certain property as the heir of one Hanuman Singh, alleging that Pan Kuar, who was the wife of Hanuman Singh, never had a son to Hanuman Singh, and further that if she did, then the defendant Dalip Narain Singh is not that son, but is one Radha Kishen, the son of Narsingh Sewak.

The defendant Dalip Narain Singh, on the other hand, alleges that he is the son of Pan Kuar by Hanuman Singh, and has tendered in evidence in support of that case a judgment of this Court of the 7th December, 1874, which was delivered in a suit between the present plaintiff and Pan Kuar relating to the property, in which suit Pan Kuar defeated the plaintiff's claim by showing that she had had by Hanuman Singh a son called Dalip Narain Singh who was then living. Dalip Narain Singh was not a party to that suit.

The defendant Dalip Narain Singh also tendered in evidence a judgment of an Azamgarh criminal Court of the 31st March, 1884, in a suit in which he was prosecuted as Radha Kishen, the son of Narsingh Sewak, and in which the criminal Court found that the Radha Kishen, the son of Narsingh Sewak, had died some time before the date of the alleged crime; and expressed an opinion that the now plaintiff, who was not the prosecutor, had got up the case.

(1) I. L. R., 6 All. 322.
(2) I. L. R., 2 All. 809.
(3) 7 W. R., 347.
(4) 14 Moo. I. A. 376.
(5) 8 W. R. 422.
(6) 25 W. R., 57.
(7) I. L. R., 11 Calc., 562.
(8) I. L. R., 12 Calc., 207.

Mr. *Ross*, on behalf of the defendant, contended that the judgments in question were admissible under s. 40 of the Indian Evidence Act, 1872, as evidence of the defence of *res judicata*, or, if not admissible on that ground, then that they were admissible under s. 43 of the Indian Evidence Act, 1872, coupled with s. 9, 11 or 13 of that Act.

Mr. *Conlan*, on behalf of the plaintiff, contending that they were not admissible, objected to their admission as evidence on the record for any purpose. In the course of the arguments before us reference was made by counsel to cases decided in England on the English law of evidence, to cases decided on appeal from India by the Judicial Committee of the Privy Council, and to cases decided in India and others subsequent to the passing of the Indian Evidence Act, 1872. It was suggested from the Bench that a discussion as to what was the Muhammadan law of evidence, which it was said formerly prevailed in the district of Gorakhpur, would throw some light on the questions before us. As it is the Indian Evidence Act, 1872, which alone, in my opinion, we have to consider and construe in this reference, it appears to me to be unnecessary to express any opinion as to whether or not these judgments or either of them would be admissible if we had to apply the English or the Muhammadan law of evidence, and that an enquiry into what may or may not have been the law of evidence in the district of Gorakhpur at a time or times more or less remote prior to the passing of the Indian Evidence Act, 1872, would throw no light on the construction of the sections to which reference has been made, and would be irrelevant. It would, it appears to me be still more irrelevant to enter upon a discussion as to whether or not the law of evidence as it is or was administered in England is or was consistent with common sense and justice, or to consider whether or not the Muhammadan law of evidence would commend itself to one who had to act according to equity and good conscience.

No doubt cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England

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or of other countries. In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man, and may safely afford guidance to us here, but this is not in my opinion one of those cases.

As all of us on the Bench are clearly of opinion that neither the previous civil or criminal proceedings can operate as *res judicata* in the suit, I shall proceed to consider the second ground on which it has been contended that the judgments in question are admissible in evidence.

As I read s. 43, a judgment which does not come within s. 40 or s. 41 or s. 42 is irrelevant unless either the existence of the judgment is in issue in the case, or the existence of the judgment is relevant under some other provision of the Act. It is admitted here on all hands that the existence of neither of the judgments in question is in issue in the suit.

In my opinion the judgment in the criminal case is not a relevant fact within the meaning of s. 8 of the Indian Evidence Act. So far as that judgment referred to Palakdhari Singh it is merely the expression of the opinion of the Magistrate as to the conduct and motives of a person who was not a party to the proceeding before him, and was not entitled to be heard in the case.

I shall now proceed to deal with s. 9 of the Indian Evidence Act, and I propose to consider whether either of these judgments are necessary in this suit for any of the purposes referred to in s. 9. If they are not necessary in that sense they are not relevant under that section. I cannot see any fact in issue or relevant fact to explain or introduce which either of these judgments is necessary. What inference is suggested by any fact in issue or a relevant fact here which is either supported or rebutted by the existence of either of the judgments in question?

The facts in issue are, is the defendant the son of Pan Kuar by Hanuman Singh, or is he Radha Kishan the son of Narsingh Sewak? I fail to see how the existence of either of these judgments is an inference suggested by either of those facts or by any relevant

fact in the suit. These judgments might possibly suggest an inference as to the truth or otherwise of the plaintiff's case, but that alone would not bring them within the words in s. 9 which I am now considering.

Can either of those judgments be said to "establish the identity" of the defendant? I think not. The judgment of this Court of the 7th December, 1874, at the furthest merely shows that in the opinion of Mr. Justice Turner and my brother Brodhurst, Pan Kuar had a son by her deceased husband Hanuman Singh, who in her pleadings in that case was called Dalip Narain Singh. Even if that judgment was evidence of *res judicata*, it would not, so far as I can see, establish the identity of the present defendant, Dalip Narain Singh, with the son of Pan Kuar by Hanuman Singh. Nor can I see how the judgment of the Azamgarh criminal Court of the 31st March, 1884, establishes for the purposes of this suit the identity of the defendant. It has not been suggested that any portions of s. 9 other than those to which I have referred could apply to either of these judgments. I entirely agree with the opinion of Sir Richard Garth, C.J., and Mr. Justice Jackson in *Gujju Lall* v. *Fatteh Lall* (1) that a judgment is not a fact within the meaning of s. 11, and I have nothing to add to the reasons given by them on that point.

As to s. 13, I entirely agree with the majority of the Full Bench of the Calcutta Court in *Gujju Lall* v. *Fatteh Lall* (1) and with Sir Arthur Collins, C.J., and Muttusami Ayyar, J., in *Ramasami* v. *Appayu* (2), that a judgment as to whether a certain person was or was not the heir to another is neither a transaction nor a fact within the meaning of s. 13. I think, however, as did Sir Charles Sargent, C.J., and Mr. Justice Nanabhai *Haridas* in *Ranchhoddas Krshnadas* v. *Bapu Narhar* (3), that the majority of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (1) put too narrow a construction on the word "right" in s. 13, and that "right" there includes not only incorporeal rights but a

(1) I. L. R., 6 Calc., 171. (2) I. L. R., 12 Mad., 9.
(3) I. L. R., 10 Bom., 469.

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right of ownership. There are no words in s. 13 which could not be applied to a right of ownership, but it is difficult to see what could, within the meaning of s. 13, clause *(a)*, be a "transaction by which the right" of a man to have it declared that he is the son of another man out of a particular woman, or that he is not some other man, could be said to be "created" or "modified." Whatever be the meaning of the word "right" in clause *(a)* of s. 13, the meaning of the word "right" in clause *(b)* must according to the principles of construction be the same.

In my opinion a previous litigation, although not between the same parties, may be a particular instance within the meaning of s. 13 *(b)* in which the right or custom in question in the subsequent litigation "was claimed, recognised or exercised, or in which its existence was disputed, asserted or departed from." The right which was not only asserted but disputed in the suit between the present plaintiff and Pan Kuar, in which the judgment of the 7th December, 1874, was given, was the alleged right of ownership of the then and present plaintiff in the property now in suit. Whether or not that right then existed depended on the question whether Pan Kuar had not a son then living by Hanuman Singh. She said she had, and that his name was Dalip Narain Singh.

It appears to me that the proper evidence of that particular instance is the record in that suit, and not the judgment alone of the 7th December, 1874, and that the record in that case may be admitted in evidence under s. 13 *(b)*, quite independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed. I think, however, that the reasons given in the judgments in that suit for the decree then cannot be considered in this suit; otherwise it might be necessary in this suit to try the former suit over again in order to see what value should be attached to the conclusions of fact or law of the learned Judges in that case. Indeed, if their reasons for the judgments which they delivered had to be considered, it might be necessary to go further. Assume that Mr. Justice Turner and my brother Brodhurst had based their

conclusions on facts on the evidence of two witnesses in that suit, and these two witnesses were subsequently convicted of perjury in respect of the evidence on which Mr. Justice Turner and my brother Brodhurst solely relied, it might be necessary also to try over again the supposed perjury case.

I have felt myself compelled to dissent from much of the judgment of the majority of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (1), and I have done so although I feel the highest respect for the opinions of the Judges who constituted that Full Bench. The case of *Surender Nath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (2) does not, I think, directly bear upon the case now before us, but I may say that if I had had to decide the question there, I would probably have come to the conclusion that the decree, the admissibility of which was then under consideration, was not admissible in evidence in that case. In some of the cases decided since the passing of the Indian Evidence Act, 1872, in which decrees, judgments or evidence of judicial proceedings not *inter partes* have been admitted, I can only hazard a surmise as to the section or sections of the Indian Evidence Act, 1872, under which they were admitted.

In the case of *Rameshur Persad Narain Singh* v. *Kunjbehari Patuk* (3), which was an appeal to Her Majesty in Council from a decree of the Calcutta High Court of the 18th August, 1874, reversing a decree of the Subordinate Judge of Gya of the 31st July, 1873, the Judicial Committee of the Privy Council admitted in evidence the proceedings in a case in the criminal Court of zila Berar in which the owners of Chahal had prosecuted some ryots of Mahool in consequence of their having closed a *khanwa* from Mahootal to Chahal, which led to a *razinamah* being come to between the taluqdárs of the two mauzas.

One of the questions in the appeal before the Judicial Committee was as to the character of the reservoir and watercourses then in dispute, and the circumstances under which they had been presumably created and actually enjoyed. As to the *razinamah* the Judi-

(1) I. L. R., 6 Calc., 171. (2) I. L R., 13 Calc., 352.
(3) L. R, 6 I. A., 33.

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cial Committee said: "It was objected that this *razinamah* does not bind the proprietor of Mahool, but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water." Apparently those proceedings and the *razinamah* in which they resulted would be admissible under s. 9 as evidence of facts necessary to explain or introduce a fact in issue there.

The record of the proceedings in the criminal Court in 1884 which the Judicial Committee admitted in evidence might be admissible under s. 9 or under s. 13 *(b)*.

In *Raja Run Bahadur Singh* v. *Musammat Lucho Koer* (1), the Judicial Committee would possibly have held that the record in the rent suit, of which the judgment referred to at page 38 formed part, was admissible under s. 13 *(b)*. In *Hunsa Koer* v. *Sheogobind Raut* (2) Glover and Mitter, JJ., in 1875 admitted two decrees in rent suits in which the plaintiff in the suit before them had sued certain ryots. One of those decrees was an *ex parte* decree.

It could not have been the intention of the Legislature in framing s. 13 that a party to a suit could not give evidence of particular instances in which a custom, for example, was exercised or recognised, unless he showed that the other party to the suit had recognised or had exercised or had had exercised against him that custom, or that such party could not give in evidence the record of a suit in which such custom had been claimed and recognised without showing that the former suit was *inter partes*. It might possibly be suggested that a custom, to come within s. 13, must be a public custom and not a quasi-private custom, such as the custom of an estate or, to take an example from England, the custom of a particular manor. If such a suggestion were well founded, then, according to the principles of construction, a right to be within s. 13 must also be a public right, which was not the opinion of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fattah Lall* (3). Although I always have a feeling of diffidence in referring to judgments delivered by me or to which

(1) I. L. R., 11 Calc. 301. (2) 24 W. R., 431.
(3) I. L. R., 6 Calc. 171.

I was a party as authorities, still I may say that my brother Tyrrell and I, having s. 13 *(b)* in our minds, held in *Gur Dayal Mal* v. *Jhandu Mal* (1) that evidence could be given of instances in which a purely local custom was recognised in suits not *inter partes*. If we there correctly interpreted the law, I cannot see why a different rule should be applied when an incorporeal right or a right of ownership is in question. If the Legislature intended that there should be any such distinction, I would have expected such distinction to have been made patent in s. 13.

As was pointed out by Sir Michael Westropp, C. J., in *Naranji Bhikhabhai* v. *Dipa Umed* (2), Sir Richard Couch, C. J., had in *Neamut Ali* v. *Gooroo Doss* (3), referring to s. 13 of the Indian Evidence Act, 1872, held that "the word transaction is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not as conclusive, but as of such a weight as the Court may think they ought to have. And in this section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used."

I shall now refer very shortly to the other Indian cases which have been pressed upon our attention, although some of them were prior to the passing of the Indian Evidence Act, 1872.

In *Kanhya Lall* v. *Radha Churn* (4) it was contended on the part of the defendants there that the judgment then under consideration was a judgment *in rem* as to the adoption. That it clearly could not have been. The question, however, which was submitted to the Full Bench of the Calcutta Court was a wider one, and the Full Bench held that the judgment was not admissible in evidence at all. The case was decided before the passing of the Indian Evidence Act, 1872. That case was much pressed upon our attention as showing what the views were of Sir Barnes Peacock, C. J., for whose decisions we all hold the highest respect. It was also contended here that that Full Bench judgment was approved by the Judicial Committee of the

(1) Weekly Notes, 1888, p. 242.
(2) I. L. R., 3 Bom., at p. 5.
(3) 22 W. R., at p. 366.
(4) 7 W. R., 398.

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Privy Council in *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (1). That is hardly a correct view of the judgment of the Judicial Committee. The question before the Judicial Committee was whether a judgment in a former suit not *inter partes*, in which issues of legitimacy and a particular form of marriage were involved, was a judgment *in rem*, and as such pleadable in bar of the subsequent suit which was before the Judicial Committee. The Judicial Committee adopted with approval so much of the judgment of the Full Bench in *Kanhya Lall* v. *Radha Churn* (2) as decided that the decree in question was in no way binding upon the plaintiff in the Full Bench case. The Judicial Committee confined themselves to the consideration of the question whether the judgment in question could operate as a judgment *in rem*, and apparently expressed no opinion as to whether that judgment was or was not admissible in evidence on other grounds and for what it was worth.

In *Mohamed Ali* v. *Shams Ali* (3), Phear and Dwarkanath Mitter, JJ., excluded a judgment in a previous suit not *inter partes* apparently on that ground. That case was also before the passing of the Indian Evidence Act, 1872. Those learned Judges, although they rejected that judgment as evidence, pointed out that that judgment did not support the inference which had been drawn from it. In any case they were bound by the judgment of the Full Bench of their own Court reported in *Kanhya Lall* v. *Radha Churn* (2) and may have been following it.

In *Ram Narain Rai* v. *Ram Coomar Chunder Podder* (4), Tottenham and Agnew, JJ., held that the Full Bench decision in *Gujju Lall* v. *Fatteh Lall* (5) precluded them from holding that the decrees in question before them were admissible, and in *Mahendra Lal Khan* v. *Rosomoyi Dasi* (6) they followed the Full Bench decision of their own Court in *Gujju Lall* v. *Fatteh Lall* (5).

In *Hira Singh* v. *Ganga Sahai* (7) all that the Judicial Committee of the Privy Council decided was that an award did not

(1) 14 Moo. I. A., 376.
(2) 7 W. R., 338.
(3) 8 W. R., 422.
(4) I. L. R., 11 Calc., 562.
(5) I. L. R., 6 Calc., 171.
(6) I. L. R., 12 Calc., 207.
(7) I. L. R., 6 All., 322.

confer on a person who was not a party to the arbitration a right which he did not possess by law, and that he could not avail himself of that award.

For the reasons already stated, I am of opinion that the record of the previous suit in which the judgment of this Court of the 7th December, 1874, was delivered, but not the judgment alone, is admissible under s. 13 *(b)* for the purposes and to the extent already indicated.

As to the judgment of the Azamgarh criminal Court of the 31st March, 1884, I fail to see how it can be brought within any of the sections to which I have referred.

I would not have referred to any of the cases decided prior to the coming in force of the Indian Evidence Act, 1872, if it had not been that great stress was laid upon them in the course of the arguments.

STRAIGHT, J.—The first of the two questions to be determined under this reference to the Full Bench, putting it in its broadest aspect, is whether in the present suit between the plaintiff Palakdhari Singh, claiming the estate of Hanuman Singh, deceased, as his heir, by ejectment of the defendant Dalip Narain Singh therefrom, the judgments and decrees of the Subordinate Judge of Gorakhpur and of this Court in appeal in a suit in which Palakdhari Singh was plaintiff and Musammat Pan Kuar was defendant, are relevant facts and as such admissible in evidence against Palakdhari Singh. In other words, is the defendant, who was no party to such former suit, entitled to use those judgments and decrees against the plaintiff? For the purpose of determining this question it must be taken that Dalip Narain Singh, the defendant, *is* the son of Musammat Pan Kuar by Hanuman Bakhsh Singh, and *is* the same Dalip Narain Singh whose name was mentioned in the former litigation. I may premise by saying that, although the argument of this point before the Full Bench took a much wider scope, it seems to me that the decision of it must be looked for and found in the Evidence Act in force in this country, and that we really have nothing to do with the principles of the English, or of any

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other law, which might apply, if that Act were not in force and binding upon us. We must take that Act as we find it and none the less give effect to it because upon a rational and ordinary construction of its provisions according to well recognised rules of interpreting statutes they appear to sanction something Courts in England or other systems of law would not permit, or to depart from principles adopted by those Courts or the Courts of other countries.

Before dealing with the legal question which I have already stated, it will be convenient very briefly to state the facts that show the mode in which it arises. It is conceded that but for the existence of a son born to Hanuman Bakhsh Singh by his widow Musammat Pan Kuar, the plaintiff Palakdhari Singh was, during the lifetime of Musammat Pan Kuar, the immediate next reversioner to the estate of Hanuman Bakhsh Singh, and, she now being dead, is the present heir thereto. The suit brought by Palakdhari Singh in 1873 was in his character of next presumptive reversioner to the estate of Hanuman Bakhsh Singh, and he sought, on the strength of his right as reversioner, to have it declared that the defendant Pan Kuar was not pregnant at the death of Hanuman Bakhsh Singh, and that she had not, as alleged by her, given birth to a male child begotten by his seed. In passing I may observe that had the Specific Relief Act been in force at that time, I do not think it could be denied that such a suit was of the nature contemplated by s. 42, just as much as if Musammat Pan Kuar had asserted an adoption of a son to her deceased husband and the plaintiff had sought to have such adoption declared invalid. The allegations and claim of Palakdhari Singh were met by Musammat Pan Kuar by a defence, which according to my view in substance came to this: "You are not a reversioner and cannot obtain the declarations you ask, because a son has been born to Hanuman Bakhsh Singh, whose existence precludes you." In other words, and to put my view into more specific form, Musammat Pan Kuar asserted the right of Dalip Narain Singh as the living son of Hanuman Bakhsh Singh to defeat the plaintiff's suit just in the same way as she might, pursuing the

analogy of an adoption, have alleged the existence of an adopted son and the validity of such adoption for a similar purpose. It is to be noted that in the former suit the second issue framed for trial by the Subordinate Judge was "Is Dalip Narain Singh the son of Hanuman Bakhsh Singh or not?" and that upon this issue both he and this Court found that the plaintiff had failed to establish his claim to a declaratory decree, because it was proved that Musammat Pan Kuar had had born of her body to her deceased husband a son named Dalip Narain Singh. So much for the former suit, and now let me turn to the one with which we are more immediately concerned. Musammat Pan Kuar died in October, 1879, and Palakdhari Singh now comes into Court against Dalip Narain Singh (I so call him as a matter conceded for the purpose of argument) and he asserts in substance—I only state what is material to this discussion:—"I am the heir to the estate of Hanuman Bakhsh Singh, his widow, Musammat Pan Kuar, now being dead, for he never had any son, and the defendant states what is false when he says he had and that he is such a son; therefore eject him and give me possession of Hanuman Bakhsh Singh's estate." The Subordinate Judge, whose judgment is under appeal, laid down among others the following issue:—"Whether after the death of Hanuman Singh any son was born of Musammat Pan Kuar or not," by which I understand him to mean born of Pan Kuar by Hanuman Singh, and he has found that there was not. I do not think I am misstating the matter therefore when I say that the main question common to the suit of 1873 and the present suit was and is, did Musammat Pan Kuar bear a son to Hanuman Bakhsh Singh, whose right as such son excluded and excludes the plaintiff from any interest in the estate of Hanuman Singh?

It is in respect of this question in issue between the parties that the defendant seeks to put in as part of his evidence the judgments and decrees in the suit of 1873 between Palakdhari Singh, the present plaintiff, and Musammat Pan Kuar. It was argued primarily for the defendant that they constituted materials sufficient to support the plea of *res judicata* taken in the statement of

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defence, and of themselves were a conclusive answer to the suit. This point is not directly before us under this reference, but I can only repeat here what I said in the Division Bench, that, accepting s. 13 of the Civil Procedure Code as embodying the rule to govern in such matters, I cannot hold that the present defendant can in a legal sense be said *to claim under* his mother, Musammat Pan Kuar; on the contrary, if his case is true, he has all along had a full proprietary estate as heir of his father, and his mother Pan Kuar never had any interest therein. Upon the plea of *res judicata* therefore I cannot hold in favour of the defendant, and in this view anything more than incidental reference hereafter to the terms of s. 40 of the Evidence Act becomes unnecessary. It has not been contended for the defendant that s. 41 of the same Act has any application, which is obvious from its terms, and a like remark applies to s. 42, which is concerned with matters alien to those involved in the present litigation. The whole point for determination fines down to this, are the judgments and decrees of 1874 within the proviso to s. 43, that is to say, is the *existence* of those judgments and decrees a fact in issue, or is it relevant under some other provision of the Evidence Act? The existence of the judgments and decrees is not a fact in issue, because it is conceded; indeed, the plaintiff himself in his examination as a witness for the defendant has admitted the institution of the suit of 1873, the objects he contemplated by it and the result of the litigation, so that even were I driven to hold that the judgments and decrees of 1874 were themselves inadmissible, the fact would remain that the plaintiff has himself admitted that he brought a suit in 1873, in which he sought to prove that Musammat Pan Kuar had not been delivered of a child by her husband Hanuman Singh, and that he was worsted. As I said when the appeal was originally before my brother Mahmood and myself, I very much doubt whether in face of the plaintiff's own admissions there was any necessity for the defendant to press to have the judgments and decrees of 1874 themselves made part of the evidence in the cause, for it is to be observed that the question under s. 43 is not whether those judgments and decrees in themselves are relevant, but whether their *existence* is relevant. Now the plaintiff

having, without objection to the propriety of the question put to him, admitted their existence; the defendant had according to my view got from him all that he could get from the judgments and decrees themselves, and their production will carry his case no further. In passing it will be convenient to look at the plaintiff's own admission, apart from any considerations as to the admissibility of the judgments and decrees, and see what value and bearing it has upon the questions of fact involved in the present litigation. Now it seems to me that it might have been fairly urged for the plaintiff that it was competent to prove on his behalf, and as a fact he did say so, that immediately he ascertained Musammat Pan Kuar was asserting that she had been delivered of a posthumous child to her deceased husband, he took measures to challenge her assertions in a Court of law, as showing conduct on his part which was consistent with the allegations put forward by him in his present suit and as indicating his *bona fides* in again coming into Court. But it seems to me, if I am right in this view, then it was equally competent for the defendant to dilute the effect of this statement by eliciting the result of such former litigation. Consequently I am not prepared to say that the statements of the plaintiff in these respects made in the course of his examination in the Court below are irrelevant to the matters in issue, apart altogether from the further question whether the defendant was entitled to make the judgment and decree of 1874 part of his evidence. It does not appear to me to inflict any hardship on the plaintiff, who was a party to those former proceedings, that, if he is allowed to appeal to his action in 1873 as indicating his vigilance, expedition and *bona fides* in questioning Pan Kuar's proceedings, he should, while having the benefit so far, be subjected to the disadvantage of the fact that two Courts of law found that Pan Kuar had had a child. But the exigencies of this reference and the view expressed by my brother Mahmood in the Division Bench require that I should go further and determine, first, whether the judgments and decrees of 1874 are themselves relevant, and secondly, if they are, to what extent may they be used. As to the first I have already pointed out that so far as s. 43 is concerned it is the

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existence of the judgments, which must be a fact in issue or relevant fact under some other provision of the Act. In the case here the existence of the judgments and decrees of 1874 is not a fact in issue, and consequently I have to see whether there is any other section of the Act which applies to them and makes them relevant. The argument at the hearing was mainly confined to a discussion of whether they fell within the term "transaction" or "instance" as used in s. 13. For the defendant it was contended that they represented a transaction, and in support of this view a ruling of Couch, C. J., *Neamut Ali* v. *Gooroo Doss* (1), to which I may add another of the same learned Judge at page 457 of the same volume and of Westropp, C.J., *Naranji Bhikabhan* v. *Dipa Umed* (2), were relied upon; a judgment of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (3) and more particularly a passage at page 310 was also referred to as showing that matter of a similar kind had been treated as part of the evidence in a case. These I may supplement by a ruling of the Madras Court in *Ramasami* v. *Appavu* (4). On the other hand the following cases were cited for the plaintiff as deciding to the contrary: *Gujju Lall* v. *Fattek Lall* (5), *Surender Nath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (6), *Ranchhoddas* v. *Bapu Narhar* (7), and the first two no doubt go to the full extent contended for by his learned counsel. The case in 6 Calcutta is no doubt entitled to the most respectful consideration, and I have read it with the greatest care, and more particularly the judgment of Garth, C.J. I regret I am unable to agree with that learned Chief Justice either in the restricted meaning he attaches to the word "right," as used in s. 13, and in this I am supported by the view of Sargent, C.J., or as to the mode in which he treats the term "transaction." I say it with the most profound respect to him that in that case, as in the argument of the one before us, there has been some confusion in the method in which the question has been discussed. It seems to me the true point is, not that the judg-

(1) 22 W. R., p. 365.
(2) I. L. R., 3 Bom., 3.
(3) I. L. R., 11 Calc., 301.
(4) I. L. R., 12 Mad., 9.
(5) I. L. R., 6 Calc., 171.
(6) I. L. R., 13 Calc., p. 352.
(7) I. L. R., 10 Bom., p. 439.

ments and decrees themselves are the "transaction" but that the suit in which they were made was a transaction, and that to establish that such a transaction took place they are the best evidence. Garth, C. J., remarks "by a somewhat strained use of the word the proceedings in a suit might also be called "transactions." Yet it is worthy of notice that Sir William De Grey, C.J., in the commencement of the written opinion of himself and the Judges in the well known *Duchess of Kingston's Case* (1), uses the word as if it were a natural and proper expression in connection with such a matter, thus:—"What has been said at the bar is certainly true as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding on a third." In my opinion the suit of 1873 between the plaintiff and Musammat Pan Kuar was a "transaction," in which the right of the defendant as the living son of Hanuman Singh was asserted and recognised, and the judgments and decrees of 1874 are the best evidence of that transaction. I should also have no difficulty, if it were necessary to do so, in holding that the defendant is entitled to put forward the suit of 1873 as an "instance" in which the right of which I have spoken was claimed and recognised. I do not think that in taking this view I am doing any violence to the language of s. 43 of the Evidence Act, which, if I understand it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections *quâ* judgments, orders and decrees, but I do not take this to make them absolutely inadmissible, when they are the best evidence of something that may be proved *aliunde*. As I have remarked before, the question is not as to the *existence* of the judgments and decrees of 1874 as a fact in issue or a relevant fact under some other provision of the Evidence Act, but whether there was a "transaction" or "instance," in which the right of the defendant was asserted and recognised, of which transaction or instance they are the best evidence.

(1) 1 Smith's L. C. 760.

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For this purpose and this purpose only I hold that they may be admitted in the present case, and in this view I am supported by Westropp and Couch, C.JJ., in the cases I have referred to at an earlier stage. No doubt it may be said, as was remarked by Garth, C.J., that in the Bombay case s. 40 of the Evidence Act met the facts there; but be that as it may, the observations of Westropp, C. J., with regard to s. 13 are none the less valuable. As to the case in 22 W. R., 365, it seems to me that the view of Couch, C. J., was directly in accordance with that I am now expressing. I am accordingly of opinion that the suit of the plaintiff against Pan Kuar was a "transaction," in which the right of the defendant as the living son of Hanuman Singh to proprietary possession of his estates was asserted to defeat the plaintiff's claim, and was recognised by a judicial tribunal for that purpose, and that the judgments and decrees are evidence of that transaction. It is enough for the purposes of this reference to decide that they are admissible for the purpose I have mentioned; as to the value to be attached to the evidence, that will have to be determined by the Division Bench disposing of the appeal on the merits.

As to the second question referred with regard to the finding of the criminal Court in 1874, that Radha Kishen, son of Rai Narsingh Sewak, was dead when that decision was passed, I have had great difficulty in determining this point to my own satisfaction, and it is not without considerable hesitation I have come to a conclusion upon it. But as I think that where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non-admissibility, I have decided to answer the second question in the affirmative. It is clear that no question was put to the plaintiff to elicit from him that he was directly or indirectly responsible for the proceedings in the Deputy Magistrate's Court, nor indeed is there any evidence to show that he was. Moreover, no right was claimed, asserted or recognised in those proceedings, and there is nothing to bring them within s. 13 of the Evidence Act. What actually happened was that one Ramanuj and a person stated to be Radha Kishen, son of Rai Nar-

singh Sewak, having been charged by one Sheoraj Kueri with voluntarily causing hurt to him under s. 323 of the Penal Code on a particular day, it was found by the Deputy Magistrate that Radha Kishen, the son of Rai Narsingh Sewak, was dead at the time of the commission by him of the alleged offence, and that the person before him charged as Radha Kishen, son of Rai Narsingh Sewak, was not that person but a person named Dalip Narain Singh. There can be no question that the Radha Kishen, son of Rai Narsingh Sewak, then found to be dead, is the same person the plaintiff in the present suit represents the defendant to be, and one of the crucial questions of fact to be decided by this Court in the first appeal is as to whether the plaintiff has established the identity of the defendant with that person. It will be conceded that if Radha Kishen, son of Rai Narsingh Sewak, is now dead, the defendant cannot be that Radha Kishen, and it seems to me from the way in which the facts shape themselves in this case, the fact of his being dead, if made out, goes to establish the identity of the defendant with the Dalip Narain Singh, who was asserted by Pan Kuar to be her son by Hanuman Singh. If then I may regard the opinion of the Deputy Magistrate that Radha Kishen, son of Rai Narsingh Sewak, was dead at the time of the inquiry in his Court in March, 1874, as a fact, which I think I may, looking to the terms of s. 3 of the Evidence Act, then pursuing the matter by the light of the facts I have already stated, with regard to the particular facts of the present case, I think I may hold that such fact is one which goes to establish the identity of the defendant with the person he alleges himself to be, or at any rate it goes to show that he is not the person the plaintiff says he is. I, however, have come to this conclusion with very grave doubt as to its soundness.

Such are my answers to the two points referred.

BRODHURST, J.—My opinions on the points that have been referred to the Full Bench in this case are in accordance with the judgments of Garth, C.J., Jackson, Pontifex and Morris, JJ., in the Full Bench case of *Gujju Lall* v. *Fatteh Lall* (1), the head-note of which is as follows:—

(1) I. L. R., 6 Calc., 171.

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"A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them."

"In a suit between A and B, the question was, whether C or D was the heir of A. If C was the heir of A, then A was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by X against A and decided against A; and this former judgment was admitted in evidence in the suit between A and B, and dealt with by the Courts below as conclusive evidence against A upon the point so decided."

"*Held* (Mitter, J., dissenting) that the former judgment was not admissible as evidence in the suit between A and B, either as a transaction under s. 13 or as a fact under s. 11 or under any other section of the Evidence Act."

This ruling was followed by the majority of another Full Bench of the same Court, *viz.*, by Petheram, C.J., Wilson, O'Kinealy and Macpherson, JJ., (Mitter, J., alone again dissenting) in *Surendor Nath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (1).

All the rulings on either side were apparently considered by the Full Benches of the Calcutta Court, as they now have been considered by the Full Bench of this Court. For the reasons that have been given by Garth, C.J., and Jackson and Pontifex, JJ., I concur in their conclusions, and I therefore hold that neither the judgment of the 31st March, 1884, by the Deputy Magistrate, Pandit Sundar Lal, nor the judgment of this Court of the 7th December, 1874, is admissible in evidence for the purposes mentioned in the referring order.

TYRRELL, J.—I have had an opportunity of reading the judgment in answer to the points referred to the Full Bench, prepared by the learned Chief Justice, and I concur with it entirely.

MAHMOOD, J.—This case is a reference made by my brother Straight with my concurrence to the Full Bench of this Court for determination of two questions of law which arose in the course of

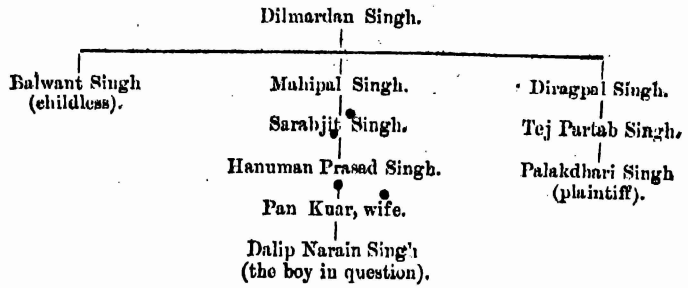
(1) I. L. R., 13 Calc., 352.

the hearing of the case in the Division Bench. Both those questions relate to the rules of the law of evidence now in force in British India as to the admissibility of judgments in evidence, and under the peculiar circumstances of this case are especially important. They have been stated in the order of my brother Straight dated the 8th January, 1889. I understand those questions to be the following :—

(1) Whether the judgment of this Court dated the 7th December, 1874, is or is not admissible in evidence as to the question whether or not Musammat Pan Kuar gave birth to a legitimate child by and after the death of her lawful husband, Hanuman Singh.

(2) Whether a judgment of the 31st March, 1884, delivered by Pandit Sundar Lal, Deputy Magistrate, upon a charge against "Ramanuj and Radha Kishen is admissible in the present trial as evidence to show that in the year 1884 the plaintiff was taking certain steps through the instrumentality of a nominal prosecution to make it appear that one Radha Kishen was then a living person or was living at the date of the alleged assault with which that judgment dealt."

These then are the questions referred to the Full Bench, but before it is easy to understand the exact bearing which they have upon the facts of this case, it is necessary to bear in mind the relative position of the parties concerned or referred to as indicated by the following genealogical table :—



Hanuman Singh, whose name appears in the above table, was admittedly the owner of the property to which this suit relates, and his permanent residence was in mauza Bansgaon, pargana Sidhwa

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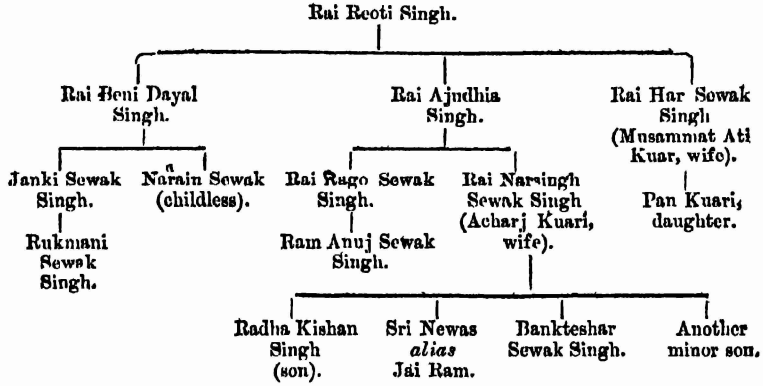
Zohna, zila Gorakhpur. In 1859 he was married (as the learned Subordinate Judge has found) to Pan Kuar, daughter of Har Sewak Singh, in mauza Sarehri, zila Azamgarh, and her genealogical tree as accepted by the lower Court is the following :—



It is also admitted and proved that the aforesaid Hanuman Singh died childless at Bansgaon on the 24th May, 1872, and that upon his death his widow, Musammat Pan Kuar, obtained possession of his estate. She did so upon an allegation that subsequent to the death of her husband she gave birth to a son by the aforesaid Hanuman Singh on the 31st January, 1873, and that the name given to the child was Dalip Narain Singh. It was indeed upon this state of things that she obtained a certificate of guardianship of the boy some time before the present plaintiff instituted his former suit.

I have been unable to discover from the record the exact date when this certificate of guardianship was granted, but that certificate must have been granted under Act XL of 1858, because, dealing with the facts of the case, that must be the law in existence applicable to the district of Gorakhpur for purposes of obtaining such certificate. The former suit which was instituted in connection with the property left by the deceased Hanuman Singh was instituted by the present plaintiff, Palakdhari Singh, on the 9th May, 1873, in which he impleaded Musammat Pan Kuar alone as defendant to the cause, and he did not implead her alleged son, whose name

was stated to be Dalip Narain Singh, who is the present defendant-appellant, whose interests are represented by the Collector of Gorakhpur as the Manager of the Court of Wards.

The object of the former suit was to establish the plaintiff's right of inheritance to the estate of the deceased Hanuman Singh upon the allegation that no son of the name of Dalip Narain Singh or any other son was born to the deceased. The suit was dismissed by the Court of original jurisdiction on the 24th January, 1874, it being held in that trial that the birth of a posthumous son to the deceased Hanuman Singh was proved, and that decision was upheld on appeal by this Court by a judgment of the Division Bench of this Court consisting of Turner, J., and my brother Brodhurst, dated the 7th December, 1874.

The first question in the case as enunciated by me relates to the admissibility of this last judgment in evidence in this cause for the purpose of proving that Musammat Pan Kuar, after the death of her husband Hanuman Singh, gave birth to a legitimate child who was named Dalip Narain; and it seems to me clear that if that judgment is held to be admissible in evidence, for exactly the same reasons, the judgment of the first Court in that case dated the 24th January, 1874, should also be admissible in evidence in this present litigation. For in this litigation the most important issue is whether or not Musammat Pan Kuar gave birth to a posthumous son of legitimate descent from the deceased Hanuman Singh.

I intend to deal with this question first because much of what I have got to say thereupon will also apply to the conclusion at which I arrive upon the second question as enunciated by me.

Taking this view of the matter, and considering the difficulty which has arisen in consequence of the case law to which my brother Straight in his order of reference to the Full Bench has alluded, I think it is due to the respect which this Court should show to the two Full Bench rulings of the Calcutta High Court and to the ruling of the Bombay High Court mentioned by my brother Straight, that I should, before expressing any opinion other than that held or indicated in those cases, resort to a full statement.

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of the steps of my reasoning which will render my conclusions intelligible upon the points referred to the Full Bench in this case.

Now I hold it true, as a sound doctrine of international law, that the acquisition of territory, whether by conquest or cession, does not abrogate the law of the land *ipso facto*, whether such law is the substantive law or the adjective law as understood by jurists. So far as I am aware, no civilized nation has ever dissented from this doctrine of the comity of nations. The present litigation has arisen in connection with property situate in the district of Gorakhpur, which at one time formed the territories of the Nawab Vazir of Oudh, over which he had full sovereignty. It was not till 1801 that by a treaty, into which His Highness entered, this territory came under British sovereignty. That treaty is printed in a book published by authority of which I sitting here can take judicial notice, *viz.*, Aitchison's Treaties, vol. II, p. 100. The treaty is dated the 10th day of November, 1801, corresponding with the 2nd Rajab, 1216 Hijri. Up to the date of the cession therefore, there can scarcely be any doubt that the law of evidence in judicial tribunals was the Muhammadan law of evidence, and that if that law is not abrogated it would be that law which would govern this case. Such abrogation can take place after acquisition of sovereignty by any legislative authority appointed by the sovereign authority, and we have to discover whether there has been such abrogation.

If there had been no such abrogation or modification of the law, I should have had very little hesitation, as I have already indicated, in applying the Muhammadan law of evidence to the admissibility of the two judgments to which this reference relates.

I am, however, not called upon to do so because since the acquisition of sovereign rights by the East India Company to whom the Nawab Vazir of Oudh ceded this territory, there has been legislation which has altered the rules of evidence relating to the matters of the kind involved in this case.

The history of the legislation which has taken place is best described in Mr. Whitley Stokes' edition of the Anglo-Indian Codes,

vol. II, page 111, etc., and in the introduction to Mr. Field's commentary on the Evidence Act. He says at page 17 of the introduction, in reference to the history of the law of evidence in British India :—

"For the Courts outside the presidency towns and not established by royal charter, no complete rules of evidence were ever laid down or introduced by authority. There were indeed a few occasional directions, partly as to procedure, partly as to evidence, to be met with in the old Regulations; and some few rules embodying the most striking reforms then recently introduced in England were inserted in Act XIX of 1853, the operation of which was, however, restricted to the Bengal Presidency. Two years afterwards Act II of 1855 was passed. This Act reproduced with some additions all the reforms advocated by Mr. Bentham and carried out in England by Lords Denman and Brougham; but nearly all its provisions presupposed the existence of that body of law upon which these reforms and amendments were ingrafted; and yet it was authoritatively laid down that the English law of evidence was not the law in the mufassal. It was also further decided that the rules of evidence to be found in the Hindu and Muhammadan law were not binding on the mufassal Courts.

"The real state of the case would then seem to have been this. All persons admitted that the Muhammadan law of evidence was not to be followed. The whole of the English law of evidence had never by any general enactment being rendered applicable to India, though some portions of it, in a modified shape or otherwise, had been expressly incorporated in the statute law of this country, Act II of 1855 being the largest entire specimen of this fragmentary legislation, while other fragments were to be found scattered through the statute book, more especially in the Courts of Civil and Criminal Procedure. Where the statute law was silent it devolved upon the higher Courts to supply the deficiency with case-made law, from which, as is well known, nearly the whole of the English unwritten code has been constructed. In laying down precedents and settling disputed points, these higher Courts

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carefully considered the different systems in force in different countries, the former usage in India (if any), the peculiar circumstances of the country and their modifying effect on principles of general application; and where, with due regard to these considerations, they found themselves able to follow the English law of evidence, they were generally willing to take it as their guide. The whole of the Indian law of evidence might then have been divided into three portions, *viz.*, one portion settled by the express enactments of the Legislature; a second portion settled by judicial decision; and a third or unsettled portion, and this by far the largest of the three, which remained to be incorporated with either of the preceding portions."

I do not wish to go further into the history of that legislation because the Evidence Act, I of 1872, in s. 2, clause (1), distinctly states that all rules of evidence shall be repealed if not contained in any statute, act or regulation in force in any part of British India.

In this part of British India of course the Evidence Act, I of 1872, is in force, and I hold that the questions raised in this case must be determined according to the provisions of that enactment.

In interpreting those provisions, however, I confess that so far as this case is concerned, my difficulty arises not so much from the statute itself as from the case-law upon the subject of this reference.

In this case of *Gujju Lall* v. *Fatteh Lall* (1) the majority of a Full Bench of the Calcutta High Court held that a former judgment which is not a judgment *in rem*, nor one relating to matters of a public nature, was not admissible in evidence in a subsequent suit, either as a *res judicata* or as proof of the particular point which it decides, unless between the same parties or those claiming under them, and the main reason was that the former judgment was not admissible in evidence either as "a *transaction*" under s. 13, or as "a *fact*" under s. 11, or under any other section of the Evidence Act. From this conclusion Mr. Justice Romesh Chander Mitter dissented. Similar is the effect in principle

(1) I. L. R., 6 Calc., 171.

of another Full Bench ruling of the same Court in *Surender Nath Pal Chowdhry* v. *Brojonath Pal* (1), which has been relied upon on behalf of the respondent in this case. On the same side of the argument a ruling of the Division Bench of the Bombay High Court in *Ranchhoddas Krishnadas* v. *Bapu Narhar* (2) has been cited.

I have no desire to criticise minutely the *ratio decidendi* of the rulings to which I have referred out of respect for the eminent Judges who took part in them both in Calcutta and Bombay. But I think it is nothing more nor less than a duty which I owe to my position here as a Judge of this Court to explain the reasons why I find it impossible to agree in the conclusion at which those Courts arrived.

In order to do so I am afraid it is necessary to refer to the elementary principles upon which the receptive power of Courts of justice in British India must depend for purposes of receiving in evidence adjudications upon questions of fact with reference to which such statements may be desired to be produced before such tribunals.

I am of opinion that by dint of s. 2 of the Indian Evidence Act (I of 1872) the rules of evidence recognised either by the common law of England, or by the statute law of that country, or by the Muhammadan law of evidence existing at the date of the cession of the Gorakhpur district in the year 1801, have ceased to exist as the law of the land. The rules of evidence which we are bound to administer are contained in the Evidence Act (I of 1872), and I say so because of the preamble to that enactment, which shows that it is not merely a fragmentary enactment, but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of s. 2 of that enactment.

But notwithstanding this opinion I cannot help holding that in cases of doubt or difficulty over the interpretation of any of the sections of that enactment we should refer for help both to the case law of the land which existed before the passing of the Act, and also

(1) I. L. R., 13 Calc., 352. (2) I. L. R., 10 Bom., 439.

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to juristic principles, which only represent the common consensus of juristic reasoning.

It is in this aspect of the case that I am afraid that I shall take up some of the time of my colleagues, and I feel myself called upon to do so because I cannot help thinking that the two Full Bench judgments of the Calcutta High Court and the Division Bench judgment of the Bombay High Court above mentioned have been much too much influenced by the doctrines of the English law of evidence applicable to such points.

Now as I understand the English law, that system of the law of evidence has by its special technicalities rendered judgments such as those involved in this case inadmissible in evidence for reasons better known to English lawyers who have founded the doctrine than to me who can only claim a slight knowledge of those doctrines. But however slight that knowledge may be, I know enough of that system to feel sure that it does not permit of the admissibility of the evidence furnished by judicial adjudications except when such previous adjudication operates either as *res judicata* or relates to a custom or right of a public nature. Judgments of that character cannot of course operate as *res judicata* in the English system of law or any other unless they are between the same parties or those whom they represent. But the question arises as to judgments which are not between the same parties but which represent solemn adjudications by Courts of justice as to the facts in issue in the trials which result in the judgments sought to be produced as evidence in later trials where the same or similar questions arise, but where the absolute identity of the opposing parties is wanting.

The English law says as to the admissibility of judgments what the Latin adage intends—*aut Cæsar aut nullus*, *i.e.*, either the judgments sought to be produced in evidence should be conclusive *inter partes* or they should not be admitted in evidence at all, unless they relate to a public custom or right, or the *factum* of judgment be a matter in issue.

If this is a right interpretation of the English law of evidence, I am of opinion that that law, so far as this point is concerned, is

probably an unreasonable law, and certainly not fitted to be imported into this country in the absence of express legislative authority.

I have asked myself the question more than once where such legislative authority exists. To that question no answer is to be found in the argument which was addressed at the bar, or in the statute law of the land, beyond the dicta of the learned Chief Justice of Bombay in *Ranchhoddas Krishnadas* v. *Bapu Narhar* (1), where he said :—

"It is true that although the Code is, in the main, drawn on the lines of the English law of evidence, there is no reason to suppose that it was intended to be a servile copy of it; but in any case, had such an important and radical change been intended, as Couch, C. J., in the case of *Neamut Ali* v. *Gooroo Doss* (2) admits is the necessary result of construing 'transaction' in s. 13 as including judgments, we should have expected it to be carried out by a special section framed for that purpose amongst those relating to judgments."

Now with profound respect for the learned Chief Justice of Bombay I find myself wholly unable to agree with him in his assumption that the English law of evidence was ever the law of the mufassal in British India. And it follows that no express legislation was necessary to abrogate that which never was the common law of the land. In the absence of express legislation the rule of justice, equity and good conscience would be the doctrine, but certainly not the common law of England, since the common law if any would be the Muhammadan law as I have already indicated. What then were the requirements of the rule of justice, equity and good conscience before the Evidence Act? They were rules of common sense, not of the common law of England so far as this part of the country is concerned, unless those rules appeal to the sense of justice, equity and good conscience which the Judges hold conformable to that doctrine.

This being my view, I cannot describe the requirements of the doctrine to which I have just referred better than by appealing to

(1) I. L. R. 10 Bom., 439. (2) 22 W. R. Civ. Rul., p. 365.

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common sense as best represented by Bentham, the father of English Jurisprudence as he is well called, and read out, even at the risk of prolixity, a long passage from his writings with all the greater pleasure because those writings are not easily accessible to the Courts subject to the jurisdiction of this Court or others interested in this question.

At page 127 of the seventh volume of the complete edition of his works, in dealing with the *rationale* of evidence, *viz.*, the principles upon which matters relating to the admissibility and the weight of evidence must depend, he defines or rather explains what the words "adscititious evidence" mean. He says at page 127 :—"What is meant by adscititious evidence, as also in what its characteristic infirmity consists, has been seen in the preceding chapter. It remains to show what is the part which ought to be taken in relation to it by the legislator and by the Judge.

"Adscititious evidence divides itself into two kinds which are not indeed mutually exclusive of one another, but which, for reasons that will appear as we advance, require to be distinguished.

"(1) Evidence *inter alios :* evidence already exhibited *coram judice,* in the character of judicial evidence, but in a cause between other parties, *i.e.,* in which the list of the parties on both sides was (either in the whole, or as to some one or more of the persons contained in it) different from the list of the cause in question, the posterior cause.

"(2) Evidence *alio in foro :* evidence already exhibited in the character of judicial evidence, but in a cause which (whether carried on by the same list of parties, or by a list in any respect different) was carried on before a different tribunal: understand, by a tribunal in which the rules of evidence are known or suspected to differ more or less from those observed in the tribunal in question."

After having so described the department of adscititious evidence, I have to quote a passage of some length from Bentham again, which will I hope not be considered too prolix, or at least not

regarded as not important enough to have been read out. The learned author says at page 170 of the same volume :—

"Few questions have been more agitated in English law than those which relate to the admissibility of and the effect to be given to different articles of adscititious evidence. The subject occupies sixty closely printed nominal octavo, real quarto pages, in Phillipps' Exposition of the Law of Evidence. Of a subject thus extensive, more than a very general view cannot be expected to be given in the present work : nor is it necessary for our purpose to go beyond the more prominent features.

"One remarkable circumstance is that the whole body of the rules of law relating to the subject are with a very small number of exceptions, exclusionary. Either the decision given in a former cause is said not to be evidence, and then it is that decision which is excluded : or it is said to be conclusive evidence, and then an exclusion is put upon the whole mass of evidence however constituted, which might have been capable of being presented on the other side.

"In saying this enough has already been said to satisfy any one who has assented to what was said in a former chapter concerning adscititious evidence, that nearly the whole of the established rules on this subject, except to the extent of the single and very limited case in which it was there seen that exclusion is proper, are bad. Accordingly the rule that a judgment directly upon the point is conclusive in any further cause between the same parties is a good rule; it is almost the only one that is.

"Even this rule is cut into by one exception, that verdicts in criminal proceedings are not only not conclusive, but are not even admissible evidence, in civil cases. For this exception two reasons are given, the one founded on a mere technicality, the other on a view, though a narrow and partial one, of the justice of the case. The first is, that it is *res inter alios acta*: the parties in the civil cause cannot, it is said, have been also the parties in the previous criminal one, the plaintiff in a criminal proceeding being the king. It is obvious, however, that the king's being plaintiff is in this case a mere

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fiction. Although the party in whose favour the previous verdict is offered in evidence was not called the plaintiff in the former proceeding, there is nothing whatever to hinder him from having been the prosecutor who is substantially the plaintiff. Now if he was the prosecutor and his adversary the defendant, it is evident that the cause is between the same parties, that it is not, in reality, *res inter alios acta*, and that if it be treated as such justice is sacrificed, as it so often is, to a fiction of law. The other reason is 'that the party in the civil suit, in whose behalf the evidence is supposed to be offered, might have been a witness on the prosecution.' This is true. He might have been a witness, and the previous verdict might have been obtained by his evidence. But it might be, that the contrary was the case. Whether he was a witness or not is capable of being ascertained. If he was not a witness, why adhere to a rule which cannot have the shadow of a ground but upon the supposition that he was? But suppose even that he was a witness, and that the verdict which he now seeks to make use of, was obtained from the jury by means of his own testimony. This will often be a very good reason for distrust, but it never can be a sufficient reason for exclusion. Under a system of law, indeed, which does not suffer a party to give evidence directly in his own behalf, it is consistent enough to prevent him from doing the same thing in a roundabout way. A proposition, however, which will be maintained in the sequel of this work, is, that in no case ought the plaintiff to be excluded from testifying in what lawyers indeed would call his own behalf, but which, by the aid of counter-interrogation, is really, if his cause is bad, much more his adversary's behalf than his own. Should this opinion be found to rest on sufficient grounds, the reason just referred to for not admitting the former verdict as evidence will appear to be, on the contrary, a strong reason for admitting it.

"Thus much may suffice as to the first rule relating to this subject in English law, a rule which has been seen to be as reasonable as the above-mentioned exception to it is unreasonable. We shall find few instances in the succeeding rules of an approach even thus near to the confines of common sense.

"For, first, a judgment is not evidence, even between the same parties, 'of any matter which came collaterally in question nor of any matter incidentally cognizable, nor of any matter to be interfered by argument from the judgment.' By the words *not evidence* lawyers sometimes mean one thing, sometimes another: here, however, not admissible in evidence is what is meant. That it ought not to be conclusive as to any fact but such as the judgment, if conformable to law, necessarily supposes to have been proved, is no more than we have seen in a former chapter: that, however, because it ought not to be made conclusive, it ought not to be admissible, is an inference which none but a lawyer would ever think of drawing. A common man's actions are received every day as circumstantial evidence of the motive by which he was actuated: why not those of a Judges.

"The next rule is that a verdict or judgment on a former occasion is not evidence against any one who was a stranger to the former proceeding: that is, who was not a party nor stood in any such relation to a party as will induce lawyers to say that he was privy to the verdict. The reason why a judgment under these circumstances is not evidence, is that it is *res inter alios acta*. But we have seen already that its being *res inter alios acta*, though a sufficient action for receiving it with suspicion, is no reason for excluding it.

"The more special reason, by which, in the case now under consideration this general one is corroborated, is that the party had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment. This being undeniable, it would be improper, no doubt, to take the judgment for conclusive. On this ground what is the dictate of unsophisticated common sense? A very obvious one. As the party has not had an opportunity to examine witnesses, to defend himself, or to appeal against the judgment, at a former period, let him have an opportunity of doing all these things now: let him have leave to impeach the validity of the grounds on which the former judgment was given, and to show by comments on the evidence, or by adducing fresh evidence, that it

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was an improper one; but do not shut out perhaps the only evidence which is now to be had against him, merely because it would be unjust on the ground of that evidence to condemn him without a hearing. In the nature of a judgment is there anything which renders a jury less capable of appreciating that kind of evidence than any other kind at its just value? But it is useless to argue against one particular case of the barbarous policy which excludes all evidence that seems in any degree exposed to be untrustworthy. The proofs which will be hereafter adduced of the absurdity of the principle, are proofs of its absurdity in this case as in every other.

"Another curious rule is that as a judgment is not evidence *against* a stranger the contrary judgment shall not be evidence *for* him. If the rule itself is a curious one the reason given for it is still more so:—'Nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary': a maxim which one would suppose to have found its way from the gaming table to the Bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to justice is not equally clear. This rule of mutuality is destitute of even that semblance of reason which there is for the rule concerning *res inter alios acta*. There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his case in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favour of C against B seems the very height of absurdity. The only fragment of a reason which we can find in the books, having the least pretension to rationality, is this, that C, the party who gives the verdict in evidence, may have been one of the witnesses by means of whose testimony it was obtained. The inconclusiveness of this reason we have already seen.

"The rule that a judgment *inter alios* is not evidence, which like all other rules of law is the perfection of reason, is in a variety of instances set aside by as many nominal exceptions, but real violations, all of which are also the perfection of reason. To the praise of common sense, at least, they might justly lay claim, if they did no more, in each instance, than abrogate the exclusionary rule. But if the rule be bad in one way, the exceptions, as usual, are bad in the contrary way."

I have quoted this passage at such length not only out of reverence for Bentham, whose views must always be considered with respect by tribunals wherever the British rule prevails, but also because the reasons stated in those passages answer the question here.

As to the first question, of course, as I have already indicated, there being no English common law of evidence antecedent to the Evidence Act, the only manner in which these judgments of 1874 could be excluded would be by reason of that Act itself. In s. 3 of that statute a definition is given as to what are relevant facts and what are not, and in s. 5 of that enactment it is laid down that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others." So that this last section renders exclusive everything which is not covered by the purview of some other section which follows in the statute. Here the case rests not upon applying any principle which is to be found in the English common law of evidence, but upon knowing whether this statute in s. 5 ever contemplated the alteration of the law as it stood at the time when the statute was passed. For the reasons stated by Mr. Justice Mitter in his dissentient judgment in the Full Bench case of *Gujju Lall* v. *Fatteh Lall* (1) I hold that the law of the land before the passing of the statute (I of 1872) was that a judgment such as that of Mr. Justice Turner and my brother Brodhurst of 1874 would be admitted in evidence. I do not wish to add anything to those reasons, because

(1) I. L. R., 6 Calc., 171.

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I adopt them fully. This indeed is the conclusion at which, I understand, the learned Chief Justice and my brothers Straight and Tyrrell have also arrived.

My difficulty here lies principally with reference to the second point in the case; whether the judgment of the 31st March, 1884, delivered by Pandit Sundar Lal, the Deputy Magistrate of Gorakhpur, is admissible in evidence or not under any one of the sections of this code of evidence. Upon this second point I have some difficulty because I understand that the Bench is not agreed as to the point involved as to its admissibility. I have already repudiated in this judgment the opinion that the English law of evidence is applicable to this case. I have now to consider whether the law which has now placed the matter upon a solid basis of legislative enactment (Act I of 1872) makes any provision to render that judgment admissible. I have already said that it would not be admissible because of s. 5, unless some provision of that Act itself renders it admissible.

In dealing with judgments we have to consider certain specific provisions of the Act. They begin with s. 40 of that enactment. That section simply renders admissible judgments which operate as pleas in bar of the action of the kind known as pleas of *res judicata* or otherwise under some other rule of law. That section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of *res judicata* is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence. In other words I have before now in the case of *Sita Ram* v. *Amir Begam* (1), stated my view for thinking that it is not an estoppel in matters of evidence, but a plea barring the action.

The next section is s. 41, which relates to judgments *in rem*, and that section is not applicable to the present case.

The third section is 42, which relates to the relevancy of judgments relating to matters of public nature relevant to the inquiry,

(1) I. L. R., 8 All., 324.

and the only other section occurring in that subdivision of the Act is 43, which says—

"Judgments, orders or decrees other than those mentioned in ss. 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act."

I have then to consider whether the judgment of the criminal Court of the 31st March, 1884, to which this reference relates, is relevant under such other part of the statute. It seems to me that, from what I have already said, there is no reason to exclude this judgment, because s. 8 of the Evidence Act lays down, "any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

Now here this judgment of the criminal Court shows one most important point which, whether the technical law describes it as a fact in issue or not, is whether or not the present defendant Dalip Narain Singh is or is not Radha Kishen whose name appears in the second pedigree. What I have got to deal with is whether upon the date of the trial which terminated in the judgment of the 31st March, 1884, there was or was not such a person as Radha Kishen existing and alive. To my mind it is perfectly relevant to know whether that was a fact or not. That a person should be prosecuted for having committed an assault and be so treated, surely it would be a fact of some consequence whether he was alive or not. A finding one way or the other would be a relevant fact as to knowing whether this person was capable of committing the assault. I am perfectly aware that the proof of identity is wanting, but I also feel sure that if the Evidence Act in the sections of its second chapter which deal with questions of relevancy of facts be searched, this judgment will be relevant under some section or another. It is a relevant fact that at the date this prosecution was commenced either Radha Kishen who is supposed to be Dalip Narain Singh was or was not alive. It is unnecessary for me to go further into this matter. At any rate under s. 8 of the Evidence Act it is shown that the fact of prosecution having been com-

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menced by the present plaintiff Palakdhari Singh against an alleged person of the name of Radha Kishen was a relevant fact as showing a motive or preparation within the meaning of s. 8. I think I may say that even if that section did not apply, there would be other sections within the scope of Chapter II to render that judgment admissible.

I regret very much that I should have had to take up so much of the time of my hon'ble colleagues over the delivery of my judgment in this case, but at the same time, having had the advantage of reading the judgments prepared by my hon'ble colleagues, I regret I have not been in a position to say that I concur in any one of them. My answer to both the questions is in the affirmative, *viz.*, that the judgment of this Court, dated 7th December, 1874, is admissible in evidence; also that the judgment, dated 17th March, 1884, delivered by Pandit Sundar Lal is also admissible in evidence.

APPELLATE CIVIL.

1887
July 21.

Before Mr. Justice Mahmood.

LACHHO AND ANOTHER (DEFENDANTS) *v.* HAR SAHAI (PLAINTIFF).*

Evidence—Burden of proof as to ownership—Possession—Suit for ejectment—Act I of 1872 *(Evidence Act)*, *s.* 110.

It is usually for the plaintiff who seeks ejectment to prove his title. But where he proves himself to have peaceably enjoyed possession for a considerable time, the person who has recently dispossessed him has to meet the presumption of law that the plaintiff's possession indicates his ownership.

In a suit for possession of immoveable property and other reliefs, it was proved that the plaintiff and his predecessors in title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant. The defendant alleged, but failed to prove, that the plaintiff had paid him rent as tenant-at-will of the premises. The lower appellate Court, upon the finding that the plaintiff's possession was that of a licensee, modified the first Court's decree, which had allowed the claim in full.

* Second Appeal No. 1808 of 1886, from a decree of T. R. Wyer, Esq., District Judge of Meerut, dated the 8th July, 1886, confirming a decree of Maulvi Maula Bakhsh, Munsif of Khurja, dated the 3rd June, 1886.

Held, with reference to s. 110 of the Evidence Act, that although in the first instance the burden of proving his title was on the plaintiff, it was shifted by his proving long undisturbed possession; that the defendant's failure to prove the alleged payment of rent went far to prove that the plaintiff's possession was adverse; and that the Court below, in acting upon the theory that such possession was that of a licensee, had wrongly set up for the defendant a defence which he had not set up for himself.

THE facts of this case are stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Mr. *G. T. Spankie*, for the respondent.

MAHMOOD, J.—The facts necessary to elucidate the question of law argued before me in second appeal are as follows:—The plaintiff Har Sahai is the son of Shankar, who is the son of Balkrishen, and belongs to the Brahman caste. The defendant No. 1, Musammat Lachho, is the daughter of Debi Das, and she on the 28th April, 1886, representing herself to have inherited the shop and the site in dispute from her father Debi Das, executed a deed of sale in favour of Nathu Mal, the defendant No. 2. These facts are admitted.

The plaintiff came into Court upon the allegation that his grandfather, Balkrishen, had acquired the shop originally, that upon his death the property devolved upon Shankar, and upon the latter's death he, the plaintiff, inherited it. The period of their continuous, undisturbed and peaceful possession is stated to be half a century. It is further alleged that in consequence of a heavy fall of rain the shop fell down, and the plaintiff in exercise of his proprietary right began to rebuild, but was obstructed by the defendants on the 2nd May, 1886, when they entered into wrongful possession and began to build in spite of obstruction to such trespass by the plaintiff. The relief sought was recovery of possession and some minor reliefs as to removal of certain materials, and recovery of price of some materials which the defendants had wrongfully appropriated.

The suit was resisted on the allegation that the plaintiff and his ancestors had no title, that their possession was as mere tenants-at-will, that the rent they paid consisted of a quarter *seer* of milk

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every morning, that this was subsequently commuted to payment of rent at 8 annas *per mensem*, and that the shop having been demolished, the plaintiff could not maintain the action.

The first Court held that considering the long and continuous possession of Har Sahai extending over forty years, and other circumstances, he had proved his title, that the defendants had not succeeded in proving any title, and that their action was pure trespass, and furnished the cause of action for the plaintiff's suit. Upon these grounds that Court decreed the claim for land, and declared the sale deed of the 28th April, 1886, void against the plaintiff, but dismissed the portion of the claim for the value of the materials.

On appeal, the learned Judge in a judgment which in some material matters differs from the conclusion of the first Court, has upheld the decree.

This circumstance has given rise to this second appeal, because while on the one hand Mr. *Sundar Lal* on behalf of the appellants pleads that upon the finding of the lower appellate Court this suit should have been dismissed, Mr. *Spankie* on behalf of the respondent in supporting his objections under s. 561, contends that the lower appellate Court was not justified in holding that the plaintiff's possession was not that of a full owner. What the lower appellate Court has found is, that the defendants had totally failed to prove their allegation as to payment of rent, in the shape of a quarter *seer* of milk or 8 annas per month, and that apparently Debi Das had allowed the plaintiff, his *parohit*, to occupy, without payment of rent, but as a matter of favour, and on these grounds that Court has dismissed the appeal with costs, without specifying in the decree the exact modifications which its conclusions necessitated, as contemplated by cl. *(d)* of s. 574 of the Civil Procedure Code. It is, however, obvious that whilst the first Court decreed the claim, the Judge has in effect modified that decree by holding that the plaintiff's possession was that of a licensee from Debi Das, and that such license was limited to the plaintiff's life-time. It appears to me that the judgment of the lower appellate Court is unsatisfactory, because

practically it is not a judgment upon the merits, and it is silent upon some of the most vital questions involved in the case. In the first place, it was necessary to consider whether in an action of this character the burden of proof regarding title to the property in suit lay upon the plaintiff or the defendants. The learned Judge has found, concurring with the first Court, that the plaintiff and his predecessors in title had been in continuous possession for forty years without payment of rent, and upon this finding Mr. *Spankie* relies in support of his objections under s. 561 of the Civil Procedure Code, and argues that the interference by the lower appellate Court with the judgment of the Court of first instance was erroneous, because long possession without payment of rent must be presumed to be proprietary and adverse. Mr. *Sundar Lal* contends that the Judge having found that it was as a favour that Debi Das allowed the plaintiff to live in the house, and his possession therefore was that of a licensee, the defendants' appeal should be decreed. In either view I am unable to dispose of the case finally.

The first point is whether the plaintiff was the owner of the property in suit or the defendant Lachho or her father Debi Das under whom she claims, and which title she conveyed to the other defendant, Nathu Mal. The question of onus in such cases is regulated by the principle formulated in s. 110 of the Evidence Act, I of 1872, a principle which only gives effect to a well known principle of law common to all systems of jurisprudence, that possession is *primâ facie* evidence of title. It is conceded by Mr. *Sundar Lal* that if in this case the plaintiff had been at the date of suit in possession of the shop in dispute, and had been sued by the present defendants, these latter appearing as plaintiffs to the action, the onus would have been on the present defendants, namely, Lachho and Nathu Mal; but the learned pleader contends that because the position of parties is reversed, and the plaintiff seeks to oust the defendants, the onus is on him, and the possession of forty years anterior to his alleged dispossession on the 2nd May, 1886, shifts the burden of proof upon the plaintiff, and renders it necessary for him to prove his title. In support of this contention he relies on the following

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cases :—*Dádábhai Narsidás* v. *The Sub-Collector of Broach* (1), *Debi Churn Boido* v. *Issur Chunder Manjee* (2), *Ertaza Hossein* v. *Bany Mistry* (3), which cases I need not reconsider in detail. Their general effect is that in a suit for possession the mere circumstance that the plaintiff succeeds in proving that he had been in possession at some time within twelve years previous to the suit is not sufficient to throw the onus on the defendant, and in such action the plaintiff must succeed by force of his title, unless the suit is possessory, as contemplated by s. 9 of the Specific Relief Act (I of 1877). Mr. *Spankie* relies upon the well known case of *Asher* v. *Whitlock* (4) for the proposition, to use the words of Cockburn, C. J., "that it is clearly established that possession is good against all the world except the person who can show good title"; and upon the following Indian cases : *Kawa Manji* v. *Khowaz Nussio* (5); *Mohabeer Pershad Singh* v. *Mohabeer Singh* (6). The effect of these Indian cases broadly stated is that when there is wrongful ouster of the person in possession, the person who comes into Court to oust such tortfeasor need not prove more than his possession of the lands in dispute, and that he had been ousted by the defendant, and that the plaintiff's prior possession was *primâ facie* evidence of his title. It seems to me that the question as to the burden of proof belongs to that department of procedure which relates only to ascertainment of facts, and being such a doctrine it is not affected by array of parties or accidents which necessitate that A should sue B or B should sue A, but by facts which in themselves furnish evidence of title or of other facts. Among other facts is the fact of possession as used in s. 110 of the Evidence Act. It seems to me that usually it is for the plaintiff who seeks ejectment to prove his title. But I also hold that when possession for thirty or forty years is proved to have been peaceably enjoyed, the person who has recently dispossessed such plaintiff has to meet the presumption of law, that the plaintiff's long possession indicates his ownership of the property. In this view of the matter it was

(1) 7, Bom H. C. R., 82.
(2) 1. L. R., 9 Calc, 39.
(3) 1. L. R, 9 Calc., 130.
(4) L. R., 1 Q B. 1.
(5) 5 Calc. L. R., 278.
(6) I. L. R.. 7 Calc. 591.

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for the defendant Lachho to have proved that Debi ever owned the property in suit, that it descended to her by inheritance, that it was ever let to the plaintiff, or that the latter ever recognised her rights. The Courts below have found that she has failed to prove the receipt of any rent from the plaintiff, and this would go far to show that the plaintiff's possession of thirty or forty years' standing was adverse. But the learned Judge (upon what evidence it is not clear) has arrived at the conclusion that the plaintiff was only a licensee of Debi Das. There was no such allegation, either by Musammat Lachho or her vendee Nathu Mal, or by the plaintiff, and this being so, Mr. *Spankie* on behalf of the respondent rightly complains that the Judge has set up a case for the defendants which they themselves never set up.

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Under these circumstances I cannot regard the case as properly disposed of, and I therefore decree the appeal of the lower appellate Court and remand the case to that Court for disposal on the merits under s. 562 of the Civil Procedure Code, with reference to the observations made above. Costs to abide the result.

Cause remanded.

PRIVY COUNCIL.

P. C.
J. C.
1889.
May 30
July 20.

SUNDAR (PLAINTIFF) *v.* PARBATI (DEFENDANT).

[On appeal from the High Court for the North-Western Provinces.]

Possessory title—Possession of and partition between co-widows of estate left by their deceased husband—Attempted adoption of sister's son by a Brahman.

Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had before his death adopted a son, to whom, also, by will, he bequeathed his estate. The adopted son died soon after the testator.

Held, that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee: also, the estate, being jointly held by them, was partible, and that either widow might maintain a suit for partition.

The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would, probably, have

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had little difficulty in accepting the opinion of the High Court that a Brahman cannot lawfully adopt his sister's son.

APPEAL from two decrees (12th June, 1885) of the High Court (1), reversing a decree (27th February, 1884) of the Subordinate Judge of Saháranpur, and dismissing the appellant's suit.

The principal matter now disputed was as to the right to possession and partition, between the plaintiff and defendant, of two widows of Baldeo Sahai, a Bohra Brahman proprietor of Muzaffarnagar, in the Saháranpur district. Baldeo, having no child by either wife, adopted, in 1875, his sister's son, Premsukh, to whom he also bequeathed his estate. Baldeo died in 1878, the widows taking the management of his property and maintaining the minor adopted son, who died in the following year, 1879.

The widows' names were entered as joint proprietors of the village lands which had been Baldeo's, by orders of the revenue authorities of 3rd, 5th and 21st April, 1880.

On 15th May, 1883, Sundar, the junior widow, sued the elder, Parbati, for a decree for partition, and complete possession, of a half share in houses and land in Muzaffarnagar, for half of the income of certain shops in the town, for an equal share of the value of an elephant, and of other moveable property. The elder widow denied the plaintiff's right to separate possession, alleging that she herself, as the elder, was entitled to be manager of the whole estate, partition not being allowed.

The Subordinate Judge fixed issues as to the adoption, and as to the will: also as to the rights of the widows. He then found that Baldeo Sahai, being doubtful as to the sufficiency of the adoption of his nephew Premsukh, had made him his successor by will. This legatee died a minor, while the widows were in possession, managing the property, and their rights were not affected, whatever might be the claims of third parties, through the deceased, in consequence of the will in his favour. He decreed the claim, directing partition.

Appeals from both parties were heard by a Division Bench, (PETHERAM, C. J., and BRODHURST, J.) and the judgment is reported

(1) I. L. R., 8 All. 1.

in I. L. R., 8 All. 1. The plaintiff's suit was dismissed without costs: the ground of the decision being that the widows could not maintain a suit founded on their possessory right to the property, not having obtained any possession in their own right as widows of Baldeo Sahai.

On this appeal,

Mr. *W. A. Raikes*, for the appellant, argued that the widow who claimed, being in possession, or joint possession, had, as a matter of right, a good title against all persons except the heirs of Premsukh, who had not come in to assert their title, and who, for aught that appeared, might not exist. She could maintain a suit for possession, when wrongly deprived of it, and her claim for separate possession, and for partition, as against the respondent, was equally valid. He referred to *Asher* v. *Whitlock* (1), *Pemraj Bhavanirám* v. *Narayan Shivaram Khisti* (2), *Krishnarao Yashvant* v. *Vasudev Apaji Ghotikar* (3). It was true that in the judgment of the Court below, the plaintiff's case was referred to as false, but this only implied "legally non-existent," as the context showed; and the facts had not been misrepresented. The contention was that the widow's right had a real existence, she having established that she had an actual interest, and sufficient possession as against the other widow. In the absence of any better title, proved against her, she had a valid claim.

The respondent did not appear.

Their Lordships, having reserved judgment, it was afterwards delivered on 20th July by LORD WATSON.

LORD WATSON.—In this case, the Subordinate Judge of Saháranpur and the High Court for the North-Western Provinces, though arriving at different results, did not differ as to the facts, which may be shortly stated.

The appellant is the junior and the respondent the senior widow of Baldeo Sahai, a Hindu zamíndár who died without issue

(1) L. R., 1 Q. B 1. (2) I. L. R., 6 Bom., 215.
(3) I. L. R., 8 Bom., 371.

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in the year 1878. The deceased had formally adopted a boy named Premsukh, who was his sister's son, and, possibly because he entertained doubts as to the validity of the adoption, he made a will on the 5th July, 1875, by which, subject to provisions for the maintenance of his mother and of his widows, who are the parties to this suit, he bequeathed his whole estate of every description to Premsukh, "whom I have brought up and educated as my son from his infancy, and have made my heir and successor."

Premsukh survived the testator, and died in minority and unmarried in December, 1879. On the death of Baldeo Sahai the two widows assumed the possession and management of his whole estate, moveable and immoveable, for behoof of his minor heir, and their names were put upon the register as being the mothers of Premsukh. After the death of Premsukh, as found by the Subordinate Judge, "they obtained possession of the zamíndári estates and other immoveable and moveable properties, and they described themselves sometimes as the widows of Baldeo Sahai and sometimes as mothers of Premsukh." It is obvious that, if the adoption of Premsukh was not valid according to the principles of Hindu law, neither of the parties to this case could have any right of succession to him; and, on the assumption that he was legally adopted, it is equally clear that, the estates having passed to Premsukh under his adoptive father's will, they could not on his decease pass to the present litigants as widows of Baldeo Sahai.

No question is raised in this case with respect to the zamíndári estates, which are registered in the joint names of the widows, the respondent, as the senior, being lambardár. A dispute arose between them as to possession of the family residence, gold and silver ornaments, and other articles of value, which they submitted to arbitration, the result being that, on the 15th July, 1880, the arbitrators issued an award, being in substance a decree of partition, in virtue of which each of the widows has since been in possession of her separate share of the subjects then in controversy. In consequence of fresh disagreements this suit was instituted by the appellant, in May, 1883, for partition and separate possession of house property,

which does not form part of the zamíndári, and also of certain moveable effects which were not included in the arbitration.

Of the issues framed by the Subordinate Judge, the only one which it is now necessary to consider is the sixth, which is in these terms :—" Has the plaintiff a right to have the property in dispute divided in equal shares as she claims ?" The learned Judge answered that question in the affirmative, and gave the appellant a decree of partition, but his decision was reversed on appeal by the High Court for the North-Western Provinces, consisting of Petheram, C. J., and Brodhurst, J., who gave judgment dismissing the suit. The carefully framed and articulate decree of the Subordinate Judge does not appear to be in any respect erroneous, if the appellant has a right to insist upon partition being made.

The Subordinate Judge purposely abstained from expressing any opinion either as to the validity of the adoption of his sister's son by Baldeo Sahai, or as to the efficacy of his will to carry the estates to Premsukh, if not duly adopted, who in that case would not be an heir of the testator. He considered it unnecessary to determine either point until the estates are claimed by a kinsman of Premsukh's paternal line, or by a reversioner or collateral heir of Baldeo Sahai. He held that, in all questions *inter se*, both widows were estopped by their own previous acts and admissions from alleging the invalidity of Premsukh's adoption; and, on that footing, their respective rights and interests being of precisely the same quality, he was of opinion that neither of them was in a position to resist a demand for partition.

The Chief Justice, in whose judgment Brodhurst, J., substantially concurred, was of opinion that the adoption of his sister's son by Baldeo Sahai, who was admittedly a Brahman, was altogether invalid, the adoption of a child, whose mother he could not have lawfully married, being contrary to the text of the Mimansas, and also to a course of decisions in the Indian Courts. The Chief Justice then deals with the present appellant's alternative contention, (which was the same with that submitted here) to the effect that, inasmuch as the widows " are in possession of the estate, they are

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competent to maintain a suit for the partition of the estate between themselves." He refers to the well known case of *Armory* v. *Delamirie* (1) where it was ruled that the finder of a jewel, though he does not acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and therefore to maintain trover; and also to the case of *Asher* v. *Whitlock* (2) in which it was held that a person in possession of land without other title has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator. The Chief Justice thus states the result of these authorities :—" Possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised." But he thus proceeds to distinguish these cases from the present. " In this case" he says " there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. To do so would be to recognise an illegal transaction, and we would be dividing an estate which has no legal existence."

If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son. But apart from that question, and also from any question touching the legal effect of Baldeo Sahai's will, the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of Premsukh in 1879, appears to them to be sufficient for disposing of this suit in favour of the appellant. Their Lordships are at a loss to understand, at all events to appreciate, the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably,

(1) 1 Smith's L. C., 3th ed, 313. (2) L. R., 1 Q. B. 1.

no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Premsukh or of Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed, and that of the Subordinate Judge restored. The respondent must pay the costs of this appeal.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

APPELLATE CIVIL.

1889
July 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MUNRO (PLAINTIFF) *v.* THE CAWNPORE MUNICIPAL BOARD (DEFENDANT).*

Review of judgment—Limitation—Act XV of 1877 *(Limitation Act), s.* 5, *sch. ii, No.* 173—*Act VII of* 1870 *(Court Fees Act), ss.* 6, 28, *sch. i, Nos.* 4, 5—*Application insufficiently stamped—Sufficient cause for admitting application after period prescribed—Presentation of application to Munsarim instead of Judge.*

On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped, and the Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889, the deficiency pointed out by the Munsarim was made good. On the 26th May the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after ninety days from the date of the decree.

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* First Appeal No. 62 of 1889 from an order of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 14th March, 1889.

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Held that s. 6 and the first paragraph of s. 28 of the Court-fees Act (VII of 1870) were applicable; that there was no mistake or inadvertence within the meaning of the second paragraph of s 28; that the Judge had no power under the circumstances to admit the application as one presented after ninety days from the date of the decree; that there was no presentation within ninety days of an application which could have been received; that no sufficient cause had been shown, within the meaning of s 5 of the Limitation Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected.

Held also that the application should have been presented to the Judge, and not to the Munsarim.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *A. Strachey*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., and TYRRELL, J.—The appellant here, Mr. Munro, had obtained a decree in appeal from the District Judge of Cawnpore against the Cawnpore Municipal Board on the 19th December, 1888. Now the Municipal Board, if they were in a position to show that s. 623 of the Code of Civil Procedure covered their case, could have applied within a period of ninety days from the date of that decree for a review of judgment. They could also have applied at a period beyond ninety days for a review of judgment, if they made out to the satisfaction of the Court, within the meaning of s. 5 of the Limitation Act, that they had sufficient cause for not making the application for review within ninety days from the date of the decree. The Court-fees Act provides that when an application for review of a decree in appeal is presented within ninety days, the court-fee which shall be paid shall be half the fee on the appeal, and that if presented on or after such ninety days, the legal fee shall be the court-fee payable on the memorandum of appeal. What took place here was that on the 26th January, 1889, *i. e.*, within ninety days, the Cawnpore Municipal Board delivered to the Munsarim of the Judge's Court an application for a review of the decree of the 19th December, 1888. That application was insufficiently stamped. The Munsarim very properly endorsed on the application "stamp insuffi-

cient." On that a dispute arose between the Government Pleader at Cawnpore and the Munsarim as to whether or not the stamp was sufficient. We need only say that as a matter of fact the Munsarim was right and the Government Pleader wrong, and that is admitted here. Further, the application should have been presented to the Judge and not to the Munsarim. The next thing that happened was that on the 25th April, 1889, *i. e.*, after the expiration of more than ninety days from the date of the decree, the deficiency which the Munsarim had pointed out was made good, and on the 26th May the application came before the Judge. The Judge admitted the application, but only admitted it on the Cawnpore Municipal Board paying the court-fee payable on an application presented on or after ninety days from the date of the decree.

Mr. Munro has appealed against that order under s. 629 of the Code of Civil Procedure. His learned counsel, Mr. *Strachey*, has taken three exceptions to the order, the first, and the only one which we need consider for the disposal of the case, being that the application was admitted after the period of limitation and without sufficient cause for the delay being shown. On behalf of the Board it has been contended that the Judge exercised his discretion as to the sufficiency of the cause within the meaning of s. 5 of the Limitation Act, and that consequently we ought not to interfere. It was also contended that the application having been delivered to the Munsarim within the ninety days, the deficiency in stamp might be made good with the leave of the Court at any time. Now, as we have said, the stamp on the 26th January, 1889, was deficient. S. 6 and the first paragraph of s. 28 of the Court-fees Act, 1870, apply. It was impossible to say that there was here mistake or inadvertence within the meaning of the second paragraph of s. 28. There was in fact no presentation within ninety days of an application which could have been received. The Judge had no power, if he had been so disposed, to have treated the application of the 26th January as an application which he could entertain by reason of the court-fee being made good after ninety days. He had no power under the circumstances to admit the application as an application presented after

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ninety days. As a matter of fact it was not an application made after ninety days, and the Municipal Board never intended to represent that they were making it as an application made after ninety days from the date of the decree. They or some one on their behalf filed at some time a *vakálatnáma* which on the face of it and without scrutiny would appear to have been given on the 26th January, 1889, to the Government Pleader of Cawnpore to act in this matter. We shall, however, refer to that document again. Now, even if this was an application made after ninety days, it would be time-barred unless the applicants satisfied the Court that they had sufficient cause for not making the application within ninety days. What cause was there? None appeared except that the Government Pleader at Cawnpore chose to dispute with the Munsarim, who was right, as to the quantum of court fee. That in our opinion is no cause at all. Consequently the Judge acted illegally in admitting this application. It was an application not fit to be received within ninety days by reason of the deficiency of stamp, and it was barred by limitation under the circumstances after ninety days. For these reasons we must allow this appeal with costs and set aside the order admitting the application for review, and restore the decree in appeal. We agree with the District Judge of Cawnpore that the *vakálatnáma* to which we have referred has a most suspicious appearance, and we direct him to hold an inquiry and to ascertain when in fact that *vakálatnáma* was given and when in fact it was filed in his Court. It appears to us that the date on the stamp has been altered, probably from 4-1-89 to 16-1-89. However, that is a matter which the Judge must consider. He will report to us and forward the evidence he takes on the point, and we will then consider what further steps are to be taken.

Appeal allowed.

FULL BENCH.

1889
July 15

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.

KEDAR NATH (PLAINTIFF) *v.* LALJI SAHAI AND ANOTHER (DEFENDANTS).

Appeal—Order absolute for foreclosure—Act IV of 1882 (Transfer of Property Act), s. 87—Execution of decree—"Decree"—Civil Procedure Code, ss 2, 244, sch. iv, No. 129—Practice—Appeal wrongly presented as appeal from o r—Such appeal not to be converted into appeal from decree.

The order mentioned in s 87 of the Transfer of Property Act (IV of 1882) is an order in execution of the substantive foreclosure decree, and is appealable as a decree under s. 244 read with s. 2 of the Civil Procedure Code upon the stamp payable in respect of such orders.

So *held* by the Full Bench, EDGE, C. J., doubting.

Where an appeal has been erroneously presented to the High Court as a first appeal from order, the Court will not convert it into a first appeal from a decree under s 244 read with s. 2 of the Civil Procedure Code.

So *held* by the Division Bench.

THIS was a reference to the Full Bench by Brodhurst and Mahmood, JJ. The order of reference was as follows:—

"This is an appeal arising out of proceedings taken under the Transfer of Property Act, and the order appealed from is one passed under s. 87 of that enactment making the decree absolute within the meaning of that section. In that section the word used is 'order,' and this appeal has been preferred as if it was a miscellaneous first appeal from order.

"Mr. *Jogindro Nath*, on behalf of the respondent, raises a preliminary objection to the effect that the appeal is really one from a decree, and that it should have been numbered and registered and dealt with as a first appeal from a decree in a regular suit, and that the court-fee payable therein should have been greater than that paid upon this memorandum of appeal, which is only Rs. 2. The learned Pandit for the appellant states, and, so far as we are concerned, rightly, that no similar appeal has, within our knowledge, been before this Court before, and that there is no established practice as to the manner in which such appeals should be dealt with. In consi-

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deration of these circumstances and the desirability of uniform practice, we direct that this case be laid before the learned Chief Justice with a recommendation that it may be heard by a Bench consisting of the whole of the Court, especially as the settlement of the case is not likely to take up much time.

"We may add that it is all the more necessary to have this question settled by the whole Court, because the learned Pandit argues that it is only a decree or order passed in the execution of decree within the meaning of clause (4) of s. 1 of the Rules of Court dated the 11th June, 1887, and if this contention is right, the case should have been placed before a Bench consisting of a single Judge."

Mr. *Howell*, the Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STRAIGHT and MAHMOOD, JJ.—We are of opinion that the order mentioned in s. 87 of the Transfer of Property Act is an order in execution of the substantive foreclosure decree, and is appealable under s. 244 of the Civil Procedure Code.

The reference to Form 129 of schedule iv of the Civil Procedure Code in the last paragraph of s. 87, does not militate with this view, but is consistent with the definition of decree in s. 2 of the Code of Civil Procedure.

EDGE, C. J.—I entertain some doubts on the question, but my doubts are not sufficiently strong to make it necessary in my opinion that I should dissent from the judgment of my brothers Straight and Mahmood, JJ.

[The case went back to the Division Bench for disposal. The parties were represented as before.]

BRODHURST AND MAHMOOD, JJ.—For the reasons stated by us in our order of the 19th December, 1887, this case was referred to a Full Bench for the determination of the point mentioned therein. The case was accordingly heard by a Bench consisting of the learned Chief Justice, our brother Straight and one of ourselves; and by the judgment of the 8th April, 1888, it was decided by the Full

Bench that the nature of the appeal was such as is contemplated by s. 244 of the Civil Procedure Code, that is to say, that it was an appeal from a "decree" as defined in s. 2 of the Code.

The effect of this ruling is that this is not a first appeal from order of the miscellaneous kind contemplated by s. 588 of the Civil Procedure Code, and under this view, this appeal was wrongly presented to this Court as a first appeal from order; it should have been preferred as a first appeal from a decree within the meaning of s. 244 of the Civil Procedure Code, read with the definition of "decree" in s. 2.

Mr. *Ram Prasad* for the appellant has upon this state of things asked us to convert this appeal into a first appeal, and to direct that it be so registered. But we are of opinion, with reference to the practice of this Court, that this procedure would be erroneous. There is no provision for it in the Code of Civil Procedure; and if we were to allow the request thus made, we should be holding that in some case where an application for revision has been made under s. 622 of the Civil Procedure Code, such application might be converted into a first appeal or into a second appeal or into a miscellaneous appeal, and this practice would no doubt introduce an element of confusion in the working of the Court, which we do not think is justified by any practice of the Court or by any authority of case law.

Under these circumstances, we dismiss the appeal, but make no order as to costs. We may add that we leave it to the appellant to take such other measure as may be available to him for filing a duly framed appeal; and we cannot at this stage consider or decide how far under the circumstances of this particular case, the appellant, if he prefers a proper appeal, would be entitled to the benefit of the indulgence warranted by s. 5 of the Limitation Act (XV of 1877).

Appeal dismissed.

1889
August 14.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

CHATTAR AND ANOTHER (PLAINTIFFS) *v.* NEWAL SINGH (DEFENDANT).*

Execution of decree—Limitation—Act XV of 1877 *(Limitation Act), sch. ii, No.* 179 (4)—*Application "in accordance with law"—Civil Procedure Code, ss.* 325 *(j)*, 341—*Act IV of* 1882 *(Transfer of Property Act), s.* 99.

The expression "applying in accordance with law" in Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4), means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

Held therefore that an application to have the judgment-debtor arrested in execution of decree, which was in contravention of the terms of s. 341 of the Civil Procedure Code, and an application to bring mortgaged property to sale, which was in contravention of s. 99 of the Transfer of Property Act (IV of 1882), were not applications "in accordance with law" within the meaning of No. 179 (4) of sch. ii of the Limitation Act.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *D. Banerji*, for the respondent.

STRAIGHT and TYRRELL, JJ.—This is an appeal on the execution side from an order of the Judge of Aligarh dated the 11th February, 1889. The decree-holder is appellant and the judgment-debtor is respondent. The decree to which the application for execution relates is dated the 21st March, 1884. It was a decree in favour of the decree-holder as usufructuary mortgagee for possession of the mortgaged property and for recovery of mesne profits of which he was deprived by the wrongful withholding of the mortgaged property by the mortgagee. The original decree-holder took certain steps in execution in the years 1884-85, and among others caused the judgment-debtor to be arrested. On the 23rd of August, 1885, he transferred his interest in the decree to the appellants. On the

* First Appeal No. 39 of 1889, from an order of H. F. Evans, Esq., District Judge of Aligarh, dated the 11th February, 1889.

7th December, 1886, they sought to bring to sale certain property as the property of the judgment-debtor, but that application was rejected on the ground that the property was unsaleable under the provisions of s. 99 of the Transfer of Property Act. I ought to have remarked that prior to this application these persons again had applied for the arrest of the judgment-debtor; but it having been found that the grant of a second warrant of arrest was illegal, he was released on the 24th September, 1886. The learned Judge whose order is impeached held that neither of the applications of the 21st August, 1886, or the 7th December, 1886, were applications "according to law," and the question before us is whether he was right or wrong in this view. Mr. *Chaudhri* for the appellants contends that any application for execution so long as it on the face of it satisfies the requirements of s. 235 of the Code of Civil Procedure is a sufficient compliance with the conditions to be found in the fourth paragraph of the third column relating to art. 179 of the Limitation Act. He says it is quite indifferent if the decree-holder under clause *(j)* of s. 235 asked for assistance from the Court in execution, which that Court, under the law, had no power to give. I cannot place that very narrow and to my mind technical construction on the words "applying in accordance with law" in the Limitation Act, to which I have referred. The necessary consequence of adopting that view would be to hold that any application, however absurd, a decree-holder might make to a Court, would be sufficient to render his application one "in accordance with law." I think the term "applying in accordance with law" must mean applying to the Court to do something in execution which by law that Court is competent to do. I do not think that it means applying to the Court to do something which, either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

In the present case it is not denied on behalf of the appellant that the judgment-debtor having been once arrested in execution of the decree, the provisions of s. 341 of the Code of Civil Procedure specifically prohibited his arrest a second time. This is a provision

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which in our opinion the decree-holder must be presumed as part of the law of the land to have known. The same remark applies to the application of the 7th December, 1886. The decree-holders were mortgagees of the property, which had been attached under that application of the 7th December, 1886, and they must be presumed to have known the prohibition contained in s. 99 of the Transfer of Property Act. Under these circumstances we think the learned Judge was right, and the appeal is dismissed with costs.

Appeal dismissed.

1889 *September* 12.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* RADHE AND OTHERS.

Practice—Criminal trial—Transfer of case by Subordinate Magistrate to District Magistrate—District Magistrate deciding on evidence taken by subordinate—Criminal Procedure Code, ss. 192, 349, 350.

S. 350 of the Criminal Procedure Code was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to have jurisdiction in that post, and is succeeded by another officer.

A subordinate Magistrate, having taken all the evidence for the prosecution and for the defence, sent the case to the Magistrate of the District, not on the grounds mentioned in s. 349 of the Criminal Procedure Code, and the District Magistrate, observing that none of the accused asked to have the witnesses reheard, gave judgment upon the evidence taken by the subordinate Magistrate. The Sessions Judge refused to interfere in revision with the District Magistrate's proceedings, on the ground that they were covered by s. 350 of the Code.

Held that this view was erroneous, that neither under s. 192 nor under s. 349 was there any transfer to the District Magistrate by his subordinate, that s. 350 was inapplicable, and that the order passed by the District Magistrate must be quashed.

THE accused in this case were charged with offences under ss. 379 and 323 of the Penal Code. The case came, in the first instance, before a Magistrate of the third class, who took all the evidence for both prosecution and defence. The Magistrate then sent the case to the District Magistrate on the ground that, as one of the parties was a Mr. Ostosh, it was advisable that the matter should be dealt with by the District Magistrate. The case accordingly came before

the District Magistrate, who, in his judgment, said, "I take up this case under s. 349 of the Criminal Procedure Code. I have gone through the record. Neither party has asked to have witnesses reheard, and after the careful and full inquiry by the tahsíldár, there is no need of it." The Magistrate, after discussing the evidence, convicted and sentenced the accused under ss. 379 and 323 of the Penal Code.

The accused applied for revision to the Sessions Judge of Jaunpur, who gave judgment on the application as follows:—

"Before transferring this case, the third class Magistrate did not record his opinion that the accused were guilty, or that they deserved a punishment different in kind from, or more severe than, he was competent to inflict; in other words, he did not submit his proceedings under s. 349 of the Criminal Procedure Code. He transferred the case to the file of the District Magistrate on the ground that 'as in this case one party is Mr. Ostosh, it is considered advisable that it should be decided by the District Magistrate.' Under s. 192 of the Criminal Procedure Code, he was not competent to make any such transfer; but on the other hand, there is no doubt that his proceeding, although erroneous, was in good faith, and therefore covered by s. 529 of the Criminal Procedure Code. The District Magistrate in his judgment says that he took up the case under s. 349 of the Criminal Procedure Code. He should, I think, have referred to s. 350 of the Code, as is indeed indicated by his remark that the accused had not 'asked to have witnesses reheard:' see s. 350 *(a)*. The conviction is therefore legal, and I see no cause for further interference. The application for revision is therefore now dismissed."

The accused applied to the High Court for revision of this order on the ground "that the District Magistrate was not competent to decide the case on the evidence recorded by the subordinate Magistrate by whom the case was transferred to him."

Mr. *A. H. S. Reid*, for the petitioner.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

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QUEEN-EMPRESS v. RADHE.

STRAIGHT, J.—This is an application for revision of an order of the Judge of Jaunpur dated the 31st May last, refusing to report for the orders of this Court an order of the Officiating Magistrate of Jaunpur dated the 23rd of the same month. In my opinion this application must prevail. According to the Magistrate's own statement he took up the case under s. 349 of the Criminal Procedure Code; but as the learned Judge has pointed out, and as is patent upon the face of the record, the third class Magistrate did not request the District Magistrate to take up the case because he could not pass a severe sentence enough, but for a totally different reason. Neither under s. 349, nor under s. 192 of the Criminal Procedure Code, could I for an instant hold that there was any transfer to the District Magistrate by his subordinate. The matter then stands thus, that by some means or another, a criminal trial, which was pending in the Court of the third class Magistrate, and which had gone to the length of all the witnesses being examined for the prosecution and the defence, finds its way into the Court of the District Magistrate, and then and there upon the record as it stands, he proceeds to deal with the case and give judgment and make an order of conviction. I do think that there is any provision in the Criminal Procedure Code which sanctions this course. The learned Judge relies upon s. 350 of the Criminal Procedure Code. That section is not applicable to the circumstances disclosed here, but is intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to exercise jurisdiction in that post, and is succeeded by another officer. I allow this application and quash the convictions and the sentences of the three petitioners. I do not think it necessary either to order or sanction a new trial, because if a new trial were to be held, and they were again to be convicted, the ten days' rigorous imprisonment they have already undergone and which was considered an adequate punishment, would upon such conviction have to be taken into account, and no additional punishment would be necessary. Therefore further proceedings would only prove abortive in this respect, and the matter should be allowed to drop.

Application allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1889
September 27.

IN THE MATTER OF THE PETITION OF BASANT BIBI.

Practice—Pardanashin lady—Personal appearance in Court.

Although there is no provision in the Criminal Procedure Code which protects pardanashin ladies from appearing in a Court of justice, nevertheless it is very undesirable to compel the attendance of such persons.

It cannot be admitted as a general principle that pardanashin ladies whose evidence is required in criminal trials are to be allowed to compel the Courts to examine them at some other place than the Court-house itself. *In the matter of the petition of Din Tarini Debi* (1) and *in re Farid-un-nissa* (2) referred to.

Where a Magistrate considered it necessary to take the evidence of a pardanashin lady, who objected to appear in Court, the High Court directed him to make arrangements so as to take her evidence either in an empty Court-room in the presence of himself, the accused, and the pleader for the prosecution, or, if no empty Court-room were available, in his own private room or some other room in the Court building.

THIS was an application under s. 435 of the Criminal Procedure Code on behalf of Musammat Basant Bibi, a pardanashin lady, for revision of an order of the Joint Magistrate of Benares directing her to appear in his Court for the purpose of giving evidence. The case in which the question arose was a charge of theft of ornaments which belonged to the minor sons of the petitioner, who was a widow, and who was one of the guardians of the persons and property of the minors, appointed under Act XL of 1858. The case was initiated on a report by the police.

In the course of the trial, the Joint Magistrate required the personal attendance in Court of the petitioner to give evidence. It was objected on her behalf that she was a pardanashin lady. The Magistrate was of opinion that this fact did not sufficiently excuse her from attendance in Court, as she could come in a palki and give evidence from inside, and issued a summons for her attendance, and as she still refused to appear, issued a warrant. An application was made under s. 435 of the Criminal Procedure Code to the Sessions Judge for revision of this order; and the Judge sent for the record, and requested the Magistrate to submit his reasons for considering the issue of a warrant necessary, the execution of the warrant being

(1) I. L. R., 15 Calc., 775. (2) I. L. R., 5 All., 92.

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IN THE MATTER OF THE PETITION OF BASANT BIBI.

meanwhile stayed. In reply to this order, the Magistrate stated that the petitioner's evidence was required for the purpose of identifying the stolen property, and expressed his opinion that "it would be very unsatisfactory not to have her evidence." When the case again came before the Sessions Judge, he observed that pardanashin ladies were not exempted by the Criminal Procedure Code from attendance in Court; that the argument that such attendance was a "degradation" to the petitioner could not be entertained, and that if it were necessary that she should give her evidence, there was no reason why she should not be required to do so. He further said :—

"As it does not appear at present that the evidence of Basant Bibi is indispensable, I would suggest to the Joint Magistrate that he should first take the evidence of the other persons whom her pleaders say they can produce on the question of identification. If their evidence is sufficient, he may come to the conclusion that the evidence of the applicant and her daughter is not necessary. If he decides that their attendance should be required, then the only order that I am prepared to pass is the following :—

"After hearing the evidence produced as to the identification of the ornaments, the Joint Magistrate will decide whether the attendance of the applicant and her daughter should be required or not. If he decides that it should be, he will notify the fact to applicant's pleader, and postpone proceedings for compelling attendance for ten days, in order that the applicant may apply to the High Court, if her pleaders say they intend to take that course. The matter will not be referred by this Court."

The Joint Magistrate, after proceeding with the case, was of opinion that the evidence as to identification of the stolen property was incomplete and unsatisfactory, and that it was necessary to take the deposition of Basant Bibi on the point. He passed the following order :—

"I therefore reject the application, but allow the applicant six days to bring the matter before the Hon'ble High Court if she likes, and if within that time no order is received from the High

Court to the contrary, she and her daughter must attend to give evidence. Summonses will issue for their appearance on the 24th September."

The petitioner thereupon made the present application to the High Court. The petition contained the following statements:—

"That the petitioner is a Hindu pardanashin lady of rank and position, of independent means, living on an income derived from landed property and business; that the petitioner is connected with the wealthiest and most respectable families of Benares, and according to the customs and manners of the country never appears before the public.

"That the enforced attendance of the petitioner in the Court of the Joint Magistrate, if allowed, will lower her in the estimation of the members of her own caste and the whole society with which she is concerned, and thus cause irreparable injury to her.

"That the wealthy families (among whom is that of the petitioner) of the caste to which the petitioner belongs, occupy a much higher social status, and are regarded with more respect, than any other Brahman family in that locality.

"That the petitioner, though not entitled to claim exemption from personal attendance, bases her request on a practice whereby sentiments like the one now in question have always been respected by the Courts in this country.

"The petitioner therefore prays that if the attendance of herself and her daughter in the Joint Magistrate's Court be deemed to be indispensable, and their examination by commission be held to be inexpedient, this Hon'ble Court will be pleased to direct the Joint Magistrate to examine the petitioner and her daughter in the house mentioned above and secured for that purpose, after necessary identification and in the presence of the proper parties and pleaders."

The house here referred to was one close to the Magistrate's Court and had been engaged by the petitioner in order that, if her examination should be considered indispensable, it might be taken there instead of in the Court.

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Munshi *Juala Prasad* and Munshi *Madho Prasad*, for the petitioner.

STRAIGHT, J. (TYRRELL, J., concurring).—From what appears in the several orders of the learned Sessions Judge and the Joint Magistrate it would seem to be highly improbable that the evidence of this lady Musammat Basant Bibi will be ever required in the case, and unless it is absolutely necessary for the purposes of justice either as regards the prosecution or the defence that her attendance should be required the Joint Magistrate should not require her attendance. Although no doubt there is no provision in the Criminal Procedure Code which protects pardanashin ladies from appearing in a Court of justice and very rightly so, all necessary safeguards to protect their privacy that are reasonable being adopted, nevertheless it is very undesirable to compel the attendance of such persons. In the event of the Magistrate in the present case finding it absolutely necessary that Musammat Basant Bibi should give evidence in the case, he would do well to consider very seriously whether he should issue coercive process for the purpose of compelling that attendance. Mr. *Juala Prasad* who appears in support of this petition for revision of the Magistrate's order has stated very frankly that what his client does object to is being compelled to appear in a public Court and to give evidence therein, but that she is quite ready under such arrangement as may reasonably secure her privacy to give her evidence in the case in the presence of the Magistrate and of the accused and his legal adviser. My attention has been called to a Calcutta ruling in the matter of the petition of *Din Tarini Debi* (1) about which I have only this to say. I am scarcely prepared to go the length of the learned Judge who decided that case, and I see no reason to depart from the view that I expressed *in re Farid-un-nissa* (2). I took a similar view in an unreported case—*in re Mubarak-un-nissa*—and while I am always most anxious to recognise and give effect to the feelings of the people of this country in such matters, I think it would be weakness to surrender as a general principle to be adopted in all cases of this description that *parda-*

(1) I. L. R., 15 Calc., 775. (2) I. L. R., 5 All., 92.

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nashin ladies whose evidence is required in criminal trials are to be allowed to compel the Court to examine them at some other place than the Court house itself. In the present case I think the Magistrate was right in refusing to go with his officials to a private house for the purpose of examining Musammat Basant Bibi, and I agree with the remarks made by the learned Judge in the course of his order in the matter. No doubt what I understand lies at the bottom of the objection of this lady is that she objects to mixing in a promiscuous crowd of persons or to being brought in contact with persons who frequent criminal Courts. In many respects I sympathize with her, because as a general rule the company that is to be found there is not of the most agreeable character. What I think the best order to be passed is that, if it becomes imperatively necessary for the Magistrate to take the evidence of this lady, he shall make arrangements so as to take her evidence either in an empty Court room in the presence of himself, the accused and his pleader and the pleader for the prosecution, if there be any, or if no empty Court room be available, in his own private room or some other room in the Court building. Mr. *Jwala Prasad* intimates that this will meet the objections of his client. I do not think that this is an unreasonable concession to make, and to this extent I accede to the request of the petitioner. The Magistrate must see that the orders thus conveyed to him are strictly carried out.

APPELLATE CIVIL.

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July 13.

Before Mr Justice Brodhurst and Mr. Justice Mahmood.

RAGHUBAR DIAL (PLAINTIFF) *v.* HAMID JAN AND ANOTHER (DEFENDANTS).*

Execution of decree—Civil Procedure Code, s. 244 (c)—Question for Court executing decree—Parties to the suit—Representative.

After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages for wrongfully keeping him out of possession. The effect

* Second Appeal No. 300 of 1887, from a decree of H P Mulock, Esq., District Judge of Shâhjahânpur, dated 15th November, 1886, confirming a decree of Maulvi Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated 15th April, 1886.

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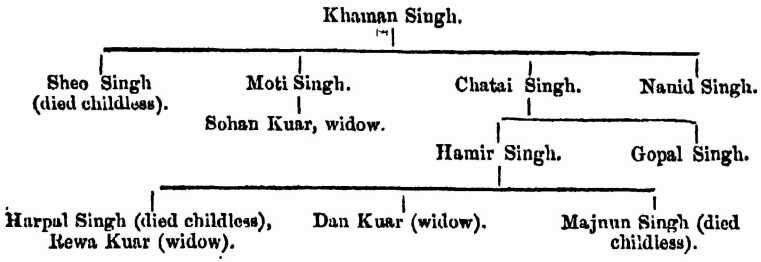
of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold, and was purchased by the decree-holder: one of the judgment-debtors had died during the execution proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently this son sold his rights and interests in the property; and his vendee sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu widow, the defendant as purchaser could not acquire by the sale any rights superior to those of the widow; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff's vendor, and had thence passed to the plaintiff.

Held that the plaintiff's vendor was a party to the suit within the meaning of s. 244 *(c)* of the Civil Procedure Code, and that he not having objected to the sale in execution of the decree, neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution proceedings: and that the suit was barred by s. 244. *Ram Ghulam* v. *Hazaru Kuar* (1) followed. *Bahori Lal* v. *Gauri Sahai* (2) distinguished. *Mulmantri* v. *Ashfak Ahmad* (3), *Roop Lall Dass* v. *Bekani Meah* (4), and *Ravunni Menon* v. *Kunju Nayar* (5) referred to.

THE following genealogical table indicates the relative position of some of the persons to whom reference is necessary for the purposes of this report:—



The property in suit originally formed part of the estate of Moti Singh, upon whose death disputes arose between his widow Sohan Kuar and his brother Nanid Singh as to the estate. The dispute was amicably settled by a compromise, whereby half of the estate was assigned to Nanid Singh and the other half remained in possession of Sohan Kuar including the property now in dispute.

(1) I. L. R., 7 All., 547. (3) I. L. R., 9 All., 605.
(2) I. L. R., 8 All., 626. (4) I. L. R., 15 Calc., 437.
(5) I. L. R., 10 Mad., 117.

By a deed executed on the 23rd October, 1867, Sohan Kuar leased certain properties including the property now in suit to the defendant-respondent Hamid Jan.

On the 28th November, 1872, Sohan Kuar executed a sale-deed purporting to convey the property now in suit to Dan Kuar (widow of Hamir Singh) and one Raghu Nath Singh, who was stated to be a brother-in-law of Gopal Singh.

The rights and interests of Hamir Singh and Gopal Singh had been purchased in an auction sale by Jugal Kishore, father of the plaintiff-appellant Raghubar Dial; but those rights were not in question in this litigation.

The subject-matter of the present litigation was the rights and interests of Harpal Singh, who executed a sale-deed in respect of them in favour of the plaintiff-appellant Raghubar Dial on the 28th August, 1885.

In the meantime Sohan Kuar died on the 27th September, 1873, and the defendant-respondent Hamid Jan thereupon brought a suit against Raghu Nath Singh and Dan Kuar (who were considered as being in possession under their purchase of the 28th November, 1872) for damages, upon the allegation that he had been kept wrongfully out of possession of the property which had been leased to him by Sohan Kuar. The litigation ended in a decree in his favour passed by the original Court and upheld by the appellate Court on the 5th May, 1876.

The effect of the decree was to decree the claim against the estate of Sohan Kuar, but the decree expressly exempted Raghu Nath Singh and Dan Kuar personally and the property which they had purchased under the sale-deed of 28th November, 1872, from liability under the decree; and it was not alleged that the decree was subsequently altered.

Meanwhile a separate litigation had been going on between Dan Kuar and Raghu Nath Singh on the one hand as plaintiffs and Jugal Kishore (father of the present plaintiff) on the other as defendant. In that litigation Dan Kuar and Raghu Nath Singh

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relying upon their purchase of the 28th November, 1872, sought to set aside the auction sale at which Jugal Kishore had purchased the rights and interests of Hamir Singh and Gopal Singh in the estate of their deceased uncle Moti Singh. But the suit was defeated on the 11th January, 1876, upon the ground that the sale-deed was null and void for fraud and collusion.

Subsequently Hamid Jan, defendant-appellant, in execution of his decree of the 14th December, 1875, brought the property now in suit to auction sale, and purchased the same himself on the 20th of June, 1882.

In the meantime Dan Kuar had died, and it appeared that in the execution proceedings which resulted in the sale of the 20th June, 1882, Harpal Singh was impleaded as representative of his mother Dan Kuar; but he did not appear in those proceedings to have raised any objections to the attachment or sale of the property now in suit.

The present suit was instituted by the plaintiff-appellant on the 19th September, 1885, having for its object recovery of possession of Harpal Singh's share which the plaintiff had purchased from him as already stated. The main contention upon which the suit proceeded was that the defendant-respondent Hamid Jan's decree in execution whereof the sale of the 20th June, 1882, took place, being limited to the estate of Sohan Kuar, the defendant as purchaser could not acquire by such sale higher rights than those which Sohan Kuar herself possessed; that her rights were only those constituting the life estate of a childless Hindu widow, which expired upon her death, and left nothing to be sold on the 20th June, 1882, at which the defendant purchased; and that upon her death the property devolved to the extent of the share claimed upon Harpal Singh whose rights were purchased by the plaintiff.

The suit was resisted, *inter alia*, upon the ground that Harpal Singh having been impleaded in the execution proceedings which resulted in the sale of the 20th June, 1882, must be taken to have become a party to the decree, and as such he might have raised

objections to the sale of the property under clause *(c)* of s. 244 of the Civil Procedure Code; that his omission to raise any such objection in the execution proceedings precluded him under that section from maintaining a separate suit such as this, and that the plaintiff who claimed under a subsequent purchase from Harpal Singh was equally barred from maintaining this suit.

Both the Courts below concurred in accepting this contention, and dismissed the suit as barred by s. 244 of the Civil Procedure Code. The plaintiff appealed to the High Court.

Mr. *Dwarka Nath Banarji* and Shah *Asad Ali*, for the appellant.

Mr. *G. T. Spankie*, Mir *Zahur Husain* and Munshi *Madho Prasad*, for the respondents.

MAHMOOD, J. (after stating the facts as above, continued) :— In second appeal it has been argued upon the authority of a ruling of the Court in *Bahori Lal* v. *Gauri Sahai* (1), and especially upon the judgment of my brother Straight in that case, that Harpal Singh, who was impleaded in the execution proceedings as legal representative of his mother Dan Kuar, could not be treated as a party to the defendant's decree in execution whereof that sale took place; that inasmuch as the title now claimed by the plaintiff was not derived from Dan Kuar, but was a separate title, therefore the suit is not barred by s. 244 of the Civil Procedure Code.

I confess that some of the observations made by my brother Straight in the last paragraph of his judgment in that case lend support to the contention presented on behalf of the appellant, but in delivering my judgment in that case I expressed considerable doubts, and summarized the case law upon the subject as it then stood.

I need not, however, re-enter into the same question in this case, because I agree with the learned Judge of the lower appellate Court in thinking that the ruling is essentially distinguishable from the present case, there being no question here as to objections having

(1) I. L. R., 8 All., 626.

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been taken under s. 278 of the Civil Procedure Code by a third party, nor any question relating to the death of such third party leaving the judgment-debtor or his legal representative as his heir.

This case is really governed by the principle which I laid down in *Ram Ghulam* v. *Hazaru Kuar* (2), namely, that the legal representative of a judgment-debtor is a party to the suit for purposes of execution, and that the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objections to execution of decree against any property pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. The rule thus expressed is supported by the various cases to which I referred in delivering my judgment in *Bahori Lal* v. *Gauri Sahai* (1), and to the cases which I then cited I may add a more recent ruling of this Court in *Mulmantri* v. *Ashfak Ahmad* (3) and *Roop Lall Dass* v. *Bekani Meah* (4), as also *Raounni Menon* v. *Kunju Nayar* (5).

Applying the principles of these rulings to the present case, I am of opinion that Harpal Singh who was duly impleaded in the execution proceedings of the defendant's decree must be dealt with as a party to the suit within the meaning of clause *(c)* of s. 244 of the Civil Procedure Code, and that he not having raised any objections to the sale of the property in execution of that decree, and the sale of the 20th June, 1882, at which the defendant-respondent purchased having taken place, neither he nor his vendee the present plaintiff could go behind that sale or claim the property upon any title which Harpal Singh might have asserted in the execution proceedings above-mentioned.

The suit was therefore barred by s. 244 of the Code of Civil Procedure, and the learned Judge of the lower appellate Court was

(1) I. L. R., 8 All., 626.
(2) I. L. R., 7 All., 547.
(3) I. L. R., 9 All., 605.
(4) I. L. R., 15 Calc., 437.
(5) I. L. R., 10 Mad., 117.

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therefore right in refraining from entering into consideration of the other questions raised by the pleadings of the parties.

I would dismiss this appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

1889 *July* 18.

PARBATI (PLAINTIFF) v. BHOLA (DEFENDANT) *

Civil Procedure Code, ss. 579, 592—*Application for leave to appeal as a pauper—Act XV of* 1877 *(Limitation Act), ss.* 5, 12, *sch. ii,* No. 170—*Time requisite for obtaining copy of decree—Exclusion of time between delivery of judgment and signing of decree.*

Judgment was pronounced by the lower appellate Court, dismissing the appeal of the plaintiff, on the 29th March, 1887. The decree was signed by the Judge on the 1st April, but, in accordance with s. 579 of the Civil Procedure Code, it bore date the day on which the judgment was pronounced. On the 15th April the plaintiff applied for a copy of the decree; on the 16th she received notice that the estimate of the costs of preparing the copy was prepared; on the 19th she paid into Court the amount required by the estimate. She had notice to attend on the 23rd for delivery to her of the copy, and on the 25th she attended and received the copy. On the 12th May she presented in the High Court, to the proper officer, an application, under s. 592 of the Code, for leave to appeal as a pauper.

Held that the application was barred by limitation under art 170, sch. ii, of the Limitation Act (XV of 1877), and that s. 5 of the Act did not apply.

Per Edge, C. J.—In computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the intermediate period should, under s 12 of the Limitation Act, be excluded if the delay in signing the decree has delayed the appellant or applicant in obtaining a copy of the decree, and not otherwise. *Bani Madhab Mitter* v. *Matungini Dassi* (1) referred to.

A delay caused by the carelessness or negligence of a party applying for copy of decree, such as negligence in coming forward to pay the money required, cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite, within the meaning of s. 12 of the Limitation Act,

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* Second Appeal, No. 835 of 1887, from a decree of Babu Pramoda Charan Banerji, Subordinate Judge of Allahabad, dated the 29th March, 1887, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 24th June, 1886.

(1) I. L. R., 13 Calc., 704.

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does not mean requisite by reason of the carelessness or negligence of the applicant it means the time occupied by the officer who has got to provide the copy, in making the copy. The important date, with reference to s. 12 and art. 170, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had notice that the copy will be ready on that date.

THE facts of this case are sufficiently stated in the judgments of the Court.

Babu *Jogindro Nath Chaudri*, for the appellant.

Mr. *Dwarka Nath Banerji*, for the respondent.

EDGE, C. J.—This was a suit for maintenance and for arrears of maintenance alleged to be due. The plaintiff's suit was dismissed in the first Court; it was dismissed on appeal in the lower appellate Court on the 29th March, 1887. On the 21st May, 1887, she presented an application to Mr. Justice Mahmood for leave to appeal as a pauper. Through some inadvertence it was overlooked apparently at the time that her application was an application for leave to appeal as a pauper, and was not a mere presentation of a memorandum of appeal.

At a late stage in the case I was called in to hear the appeal by Mr. Justice Brodhurst and Mr. Justice Mahmood. We have heard a long argument on the merits of the case, and have called upon Mr. *Jogindro Nath* to satisfy us that the application for leave to appeal was not barred by limitation. The dates are shortly as follows:—On the 29th March, 1887, the lower appellate Court delivered judgment dismissing the plaintiff's appeal. The decree of the lower appellate Court bears date the 29th March, 1887; but as a matter of fact it was not signed by the Judge until the 1st April, 1887. On the 15th April, 1887, the plaintiff applied for copies of the judgment and decree; on the 16th April she had notice that the estimate of the costs of preparing the copies was prepared; on the 19th April she paid into Court the amount required by the estimate; she had notice to attend on the 23rd April, for the delivery to her of the copies; on the 25th April she did actually attend and received the copies of the judgment and decree; on the

12th May, 1887, her application was presented to the officer in this Court whose duty it is to see that the proper fees are paid on documents and to report whether the applications are made within time, and he on the same 12th May made report that the application was four days beyond time. On the 21st May the applicant presented her application for leave to appeal as a pauper to Mr. Justice Mahmood, and, as I have said, he, overlooking the fact that it was an application for leave to appeal as a pauper, not a memorandum of appeal, admitted the case as if it was a memorandum of appeal, but reserved the question of limitation for consideration at the hearing of the appeal.

Mr. *Chaudhri* has contended that the period of limitation should be computed from the 1st April, and not from the 29th March, 1887. His contention is that, inasmuch as the decree was not signed by the Judge until the 1st April, the period between the 29th March and the 1st April should be allowed to the applicant. But referring to the Limitation Act of 1877, we find that by art. 170 of sch. ii the time for presenting an application for leave to appeal as a pauper is fixed at thirty days from the date of the decree appealed against. By s. 579 of the Code of Civil Procedure it is enacted that the decree of the appellate Court shall bear date the day on which the judgment is pronounced. The section also provides that the decree shall be signed and dated by the Judge who passed it. Reading that section as it must be read, the date which the decree should bear is the date when the judgment was delivered, that is the date must be looked to when applying art. 170.

Mr. *Chaudhri* has cited the case of *Bani Madhub Mitter* v. *Matungini Dassi* (1) as an authority for showing that where the decree is not signed until a date subsequent to the date of delivery of judgment, the intermediate time should be allowed. In my opinion, applying s. 12 of the Limitation Act to such a case, allowance should be made for the time between the date when a judgment was pronounced and the date when the decree was signed, if the delay in signing the decree delayed the applicant in

(1) I. L. R. 13 Calc., 104.

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obtaining a copy of the decree, and not otherwise. In such a case as that it would clearly be, within the meaning of s. 12, time which was requisite for obtaining a copy of the decree, because a copy of the decree could not be obtained until the decree was signed by the Judge. But that is not the case here. Here no application was made until the 15th April; so that in no sense was the applicant delayed in obtaining a copy of the decree by the fact that the decree was not signed by the Judge on the date the judgment was pronounced, but was signed on the 1st April. Consequently the period between the 29th March and the 1st April cannot in my opinion be allowed.

There is another question about the computation of time, and that is whether this lady having had notice on the 16th April of the amount of the estimate, and delayed until the 19th April to pay into Court the money required for making the copies, such delay should be allowed? In my humble judgment delay caused by the carelessness or negligence of a party applying for a copy cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite there does not mean requisite by reason of the carelessness or negligence of the applicant: it means the time which is occupied by the officer who has got to provide that copy, in making the copy.

Mr. *Chaudhri* pressed upon us a circular order issued in 1882, which had reference not to this Court but to the Courts below, and is in favour of his contention.

What we have to consider in this case is not whether a circular order of this Court issued for the guidance of subordinate Courts was justified in law, but the true construction of art. 170 of the second schedule and s. 12 of the Indian Limitation Act, 1877. It appears to me that one limit of the period is not the date when the copy was delivered, but the date when the copy was ready for delivery to the applicant, if the applicant had chosen to apply, where the applicant had notice that the copy would be ready on that date. Otherwise we should be extending the period of limitation beyond the period contemplated by the Limitation Act, and would be

excluding from the period of limitation the time, it might be one month, two months or two years, during which an applicant with notice of the date when a copy would be ready, neglected to take delivery of it.

Again, the clause in the circular order as to making allowance for other days is, it appears to me, a clause which we must not consider when we have to deal with the Limitation Act. Delays caused by the negligence of an applicant in coming forward to pay the money for a copy cannot be considered as time requisite for obtaining the copy of a decree.

In any view of this case the application for leave to appeal as a pauper was out of time when it came before this Court. S. 5 of the Indian Limitation Act, 1877, does not apply to an application of this kind. The result in my opinion is that we must treat this as a case in which the application for leave to appeal as a pauper should have been refused, having regard to its being four days beyond time.

Under these circumstances I am of opinion that this application for leave to appeal as a pauper is barred, and it must be dismissed with costs.

BRODHURST, J.—The plaintiff Musammat Parbati sued her husband Bhola, who is of the Teli or oil-seller caste, for a maintenance allowance of Rs. 4 per mensem, and with reference to an order of the criminal Court passed in her favour on the 16th January, 1883, she also sued for recovery of Rs. 64 as maintenance at the same rate, for sixteen months, from May, 1884, to August, 1885.

She alleged that she was married to the defendant eleven years ago; that she went to live with him three years afterwards; that she lived with him for about five years, and that about three years prior to the date of suit he turned her out of his house without any reason whatever.

The defendant in reply stated that the plaintiff was not entitled to a maintenance allowance, because he never expelled her from

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his house, but she refused to live with him; that she was out of caste on account of her misconduct; that she is a Sudra; that women of her class maintain themselves by labour, and that one rupee per mensem was a sufficient maintenance for her; that she was not entitled to the Rs. 64 she claims, because she, in the Magistrate's Court, refused to live with him the defendant, and she therefore did not receive the maintenance; and that defendant's income never exceeds Rs. 48 per annum.

The case was tried by the Munsif, a Hindu. He held that under the Hindu law a woman who deserted her husband of her own accord and without serious violence or ill-treatment on his part was not entitled to maintenance, but that if the husband turned his wife out of his house and refused to permit her to return to it he would be liable to pay her maintenance; that the parties had not produced any direct evidence on these points; that the plaintiff's witnesses stated that the defendant kept another woman of his caste as a mistress, whilst the defendant's witnesses deposed that the defendant was married to that woman; that the plaintiff's misconduct was not proved by any legal and reliable evidence; but on the other hand that ill-treatment by the defendant was not proved, and that the plaintiff had not proved her claim; and the Munsif dismissed her suit.

An appeal was preferred from the Munsif's decree. It was decided by the Subordinate Judge, who also is a Hindu. He found that "the plaintiff has utterly failed to prove cruelty or any other justifiable reason for her refusal to live with her husband. There is in fact a total absence of evidence on the point; all that her witnesses prove is that she goes to her husband and lives with him, then the two fall out and quarrel, and the wife comes away on the allegaton that she is beaten by her husband. There is no evidence whatever as to the chastisement or as to ill-treatment of any sort. The plaintiff herself has not volunteered her own evidence on the point. She has thus failed to show any justification for not residing with her husband, and cannot therefore claim maintenance. The appeal is accordingly dismissed with costs."

The plaintiff was permitted to bring her suit, and also her appeal *in formâ pauperis*. I now find what I was previously unaware of, that she applied to this Court for leave to file a second appeal as a pauper. Her application was four days beyond time. She alleged that "as she fell sick she could not present this appeal within time." It is now obvious that this petition should have been rejected, because it was positively barred by limitation, and was not admissible under the provisions of s. 5 of the Limitation Act.

The appeal however was admitted by my brother Mahmood, "subject to such objection as may be raised by the respondent as to the appeal being beyond limitation, &c."

The learned counsel who now represents the respondent was unaware of this order, and consequently did not take any objection on this point.

The case came before my brother Mahmood and myself in second appeal. The pleas taken by the plaintiff-appellant are as follows :—

"1. The findings of the lower Court are contrary to law. The plaintiff is entitled to maintenance.

"2. When the criminal Court fixed maintenance, the plaintiff should get it so long as the said order is not set aside.

"3. The finding of the lower appellate Court is bad, inasmuch as it is not exhaustive."

As to the second plea, the criminal Court's order referred to apparently ceased to be in force about May, 1884, and the plea is obviously unsustainable.

The other two pleas are extremely vague and weak.

In the plaint there is no allegation of cruelty, and there is not even an allusion to Musammat Ghasiti.

I am now clearly of opinion that the plaintiff-appellant has met with unusual and uncalled-for indulgence, and that her second appeal, which was beyond time and ought not I consider to have been admitted, should after admission have been dismissed at the first hearing. I think that my brother Mahmood and myself must

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have had some misapprehension as to the circumstances of the case, and that, regarding the plaintiff-appellant as a poor and perhaps injured woman without any legal adviser, we remanded the case under s. 566 of the Civil Procedure Code for findings on five issues that we framed.

Those issues have now been very carefully tried by the learned Subordinate Judge. His findings generally are adverse to the plaintiff-appellant, and objections to them have been filed under s. 567 of the Code of Civil Procedure.

The lower appellate Court on the first issue found that the plaintiff was married to the defendant about the year 1875; that they began to cohabit as man and wife about 1876; that the plaintiff lived with her husband till about June, 1882, that is, for over five years; that they lived apart for about fifteen months after she had obtained a Magistrate's order of the 15th January, 1883, awarding her maintenance; that after the expiration of the fifteen months the plaintiff and defendant came to a compromise; that the plaintiff returned to her husband and lived with him until the early part of September, 1884, when she again left him and applied to the Magistrate for an order of maintenance, but that her application was refused; that the total period of cohabitation was thus from 1876 to the middle of 1882 and again for a period of about six months prior to September, 1884.

On the second issue the Subordinate Judge found:—"There is no evidence whatever to prove that the plaintiff was ill-treated, and the evidence of her own witnesses noticed above shows that she came away from her husband because he would not allow her to go to her mother's house. I am of opinion that that was the first reason for which differences arose between the parties, and as the plaintiff's mother did not send her to the defendant's, the latter got up the story alleged by him as to her misconduct and brought another woman who is now living with him. The name of that woman is Musammat Ghasiti, as she herself states it to be. It is admitted by both parties that shortly after she had come to cohabit with the defendant, the plaintiff made her application to the crimi-

nal Court for maintenance, so that Musammat Ghasiti began to live with the defendant from the end of 1882. The exact date is unknown and cannot be ascertained."

On the third issue the Subordinate Judge held that "Musammat Ghasiti is, according to the rules of the caste to which the parties belong, the lawfully married wife of the defendant, and that she is not in the position of a mistress."

The finding on the fourth issue is :—

"The defendant is certainly unwilling to provide a separate house for the plaintiff. It appears from the plaintiff's own statement that she lived in the same house with Musammat Ghasiti, and she has stated in her deposition in this case that if her husband does not ill-treat her she has no objection to live with him and his other wife, so that the presence of Musammat Ghasiti in the house of the plaintiff's husband is no ground for her objecting to live with him, and she has admitted that she never had any difference with Ghasiti during the six months that she had lived in the same house with her in 1884."

On the fifth issue the Subordinate Judge found that "Rs. 4 a month is a reasonable amount for the plaintiff's maintenance, having regard to the rank in life of the parties and the pecuniary means of the defendant."

I see every reason to believe that these findings are perfectly correct, and they are findings of fact with which, I consider, we are not empowered to interfere in second appeal. I would therefore have dismissed the appeal with costs, but my brother Mahmood was of a different opinion. He requested Mr. *Jogendro Nath Chaudhri* to appear for the appellant, and that learned pleader having acceded to the request, informed us that he was prepared to argue :—

1. Refusal of a wife to live with her husband may be a plea in answer to a suit for maintenance, but that such refusal should have been preceded by an offer on the part of the husband to maintain her.

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2. Upon defendant's own admission he has contracted a second marriage because plaintiff left his house without his consent. The plaintiff must be treated as a forsaken wife under the Hindu law, and thus entitled to maintenance.

3. That a charge of infidelity in open Court and on oath brought against the wife amounts to cruelty in law—

(a) Because it may lead to the wife being put out of caste.

(b) Because it is an implied repudiation of the wife.

4. (*Per* Mahmood J.). Where in British India polygamous marriages are allowed, the husband, according to the rule of justice, equity and good conscience, is bound to provide separate abodes for each wife, and his failure to do so and his insisting upon his two or more wives cohabiting with him in the same abode amounts to legal cruelty entitling any one of such wives to separate maintenance.

Questions are here raised that have not been taken by the parties themselves in any one of the three Courts in which the case has been heard and argued.

These questions have been raised by my brother Mahmood directly or indirectly through the learned pleader, who has at his request, at this late stage in the proceedings, appeared on behalf of the appellant.

I thought that we should not now reopen the case to consider these questions, and owing to this difference of opinion between my brother Mahmood and myself, the learned Chief Justice has consented to give his assistance in disposing of the case.

We have now heard Mr. *Chaudhri* for the appellant and Mr. *Banerji* for the respondent on such points as the majority of us held they were entitled to argue.

Mr. *Chaudhri* in support of his arguments referred us to a law which we unanimously held had no bearing on the question before us, and he referred us also to a text of Hindu law which in the opinion of the Chief Justice and myself did not in any way support

his case. He has not stated anything to induce me to believe that the case has not been properly disposed of by the lower Courts.

Mr. *Banerji* on the other hand has referred us to texts of the Hindu law and to rulings of the High Courts of Calcutta, Bombay and Madras that support his arguments and the judgments of the lower Courts.

Having regard to all the circumstances of the case, there is not I think any necessity to quote the authorities above alluded to.

I concur in dismissing the appeal with costs.

MAHMOOD, J.—This appeal has arisen out of a suit instituted by the plaintiff-appellant, Musammat Parbati, against her husband, Bhola, defendant-respondent, on the 7th October, 1885, for fixation of the amount of maintenance and recovery of arrears thereof due to her.

Both the Courts below have concurred in dismissing the suit upon grounds which represent to my mind extremely doubtful propositions of the Hindu law of maintenance relating to superseded wives such as the plaintiff in the present case.

I am however relieved from entering into the somewhat difficult questions of the Hindu law raised by the facts of this case and by the learned arguments which have been addressed to us on behalf of the parties. The solitary reason why I am so relieved is that, upon consideration, I have arrived at the opinion that this appeal is barred by limitation and should be dismissed as such without entering into the merits of the points of law raised in the case.

The facts relating to the question of limitation are that the plaintiff-appellant, who has all along been suing *in formâ pauperis*, had her appeal to the lower appellate Court, which dismissed it by its judgment of the 29th March, 1887, and it is from that decision that the plaintiff applied to this Court under s. 592 of the Civil Procedure Code for leave to be allowed to appeal as a pauper. This application was presented to the office of this Court on the 12th May, 1887, and the office report of that date shows that the application was on that date four days beyond the period of limitation.

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The application came on for hearing before me sitting as a single Judge on the 21st May, 1887, and upon that date I made the following order :—

"Subject to such objection as may be raised by the respondent as to the appeal being beyond limitation, I admit the appeal."

The appeal was accordingly registered as second appeal No. 835 of 1887, and in due course it came on for hearing before my brother Brodhurst and myself, and we, by our order of the 3rd January, 1887, remanded the case under s. 566 for findings upon certain points which we therein mentioned.

In pursuance of that order the lower appellate Court recorded its findings on the 21st March, 1889, and those findings having been submitted to my brother Brodhurst and myself as Judges of the Division Bench, we, by our order of the 11th July, 1889, held that the case was a fit one for decision by a Bench consisting of three Judges, and we directed that with this recommendation the case be laid before the learned Chief Justice for orders.

By the learned Chief Justice's order of the 11th instant this Bench consists of the Judges named in that order, and we have heard the appeal upon the merits.

In the course of the argument either before the Division Bench consisting of my brother Brodhurst and myself or before this Bench, no objection was pressed on behalf of the respondent as to the appeal being barred by limitation.

I am of opinion, however, that the imperative requirements of s. 4 of the Limitation Act (XV of 1877) render it necessary for us, as Judges who have to dispose of this appeal, to take the objection ourselves.

In the case of *Mangu Lal* v. *Kandhai Lal* (1) I took occasion at some length to explain the veiws which I have long entertained that the Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England that statutes of this description must be construed strictly

(1) I. L. R. 8 All. 475.

against their operation. On the contrary I held that such Acts, where their language is ambiguous or indistinct, should receive a liberal interpretation and be treated as "*statutes of repose*," and not as of a penal character or as imposing burdens. It was in view of the opinions which I thus expressed and to which I still adhere, that in delivering my judgment in *Husaini Begam* v. *The Collector of Muzaffarnagar* (1), I was constrained to dissent from my brother Tyrrell, and dismissed the appeal as barred by limitation. My judgment in that case was upheld by a Bench of three Judges of this Court, who heard an appeal from my judgment under s. 10 of our Letters Patent in the same case—*Husaini Begam* v. *The Collector of Muzaffarnagar* (2).

With reference to the views which I have thus on more than one occasion expressed from the Bench as to the applicability of the law of limitation, I entertain no doubt that this appeal is barred by limitation and should be dismissed as such without any trial of the merits of the questions raised in the appeal.

I have already stated that proceedings in this case, so far as this Court is concerned, began with an application under s. 592 of the Civil Procedure Code, namely, with an application for leave to be allowed to appeal as a pauper, which application was made on the 12th May, 1887, and was admitted by me by my order of the 21st May, 1887, subject to such objections as might be raised by the respondent.

I am of opinion that my order of the 21st May, 1887, admitting the appeal, was erroneously passed, as it seems to me that in passing that order I must have dealt with pauper appeals upon the same footing as ordinary appeals, and overlooked the stringent provisions of the Limitation Act, which draw a marked and almost an invidious distinction between an appeal by an appellant who can pay the court fees, and an appeal by a person, such as the plaintiff-appellant in this case, who admittedly cannot afford to pay the court fees.

(1) I. L. R., 9 All., 11. (2) I. L. R., 9 All, 655.

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That order can be considered by us upon the principle of a Full Bench ruling of this Court in *Dubey Sahai* v. *Ganeshi Lal* (1); indeed it can be set aside, as this Bench is now seized of the whole case for disposal.

Mr. *Dwarka Nath Banerji* who appears for the respondent stated that he did not insist upon the appeal being barred by limitation, because such a plea was not taken when the case was heard by my brother Brodhurst and myself on the 3rd January, 1889, when we remanded the case under s. 566 of the Civil Procedure Code, and the learned counsel desisted from pressing the plea because he considered it to be too late at this stage of the case.

I am of opinion, however, that the order of my brother Brodhurst and myself dated the 3rd January, 1889, though made without any argument being addressed to us as to the appeal being barred by limitation, does not debar this Bench from holding that the application for leave to appeal preferred to this Court on the 12th May, 1887, was barred by limitation, that therefore my order of the 21st May, 1887, whereby the application was admitted subject to such objections as the respondent might raise upon the question of limitation, was *ultra vires*, and should be set aside as such, resulting in the dismissal of this appeal as barred by limitation.

It is to this question that I wish to address myself.

I have already indicated that the plaintiff, a superseded wife of the defendant, who has taken another wife, has possibly, if not probably, a very good case under the Hindu law itself, to require her husband to provide her with separate maintenance according to his rank in life. Her appeal seeks decision of this question. She is admittedly a pauper and cannot afford to satisfy the requirements of what certainly cannot be called the requirements of justice, but the requirements of the revenues of the State.

It is in this light that I as one of Her Majesty's Judges of this Court regard the question, and I deal with the law as it now stands irrespective of any considerations of good policy, which fall within

(1) I. L. R., 1 All., 34.

the province of the Legislature much more than within the province of the Judge.

Viewing the case in this light, I hold that both the Code of Civil Procedure (Act XIV of 1882) and the Indian Limitation Act, XV of 1877, draw such a marked distinction between the rich and the poor when they are litigating with each other, that to say the least much plausibility in given to what has sometimes been said, that the remedies of law even as administered in British India are available more to the rich than to the poor.

For instance, what would be an ordinary first appeal under s. 540 of the Civil Procedure Code to a person who can afford the court fees is no longer such an appeal in the case of a person who is a pauper and cannot afford to pay the court fees. For his case then, though absolutely similar, falls not under s. 540 of the Code, but under s. 592, which disables the pauper appellant from questioning the lower Court's decree upon grounds absolutely similar to those which enable the rich appellant, so long as he can afford to pay the court fees, to insist upon his case being heard and determinedupon grounds such as s. 540 of the Civil Procedure Code permits.

The same marked distinction between the poor appellant and the rich appellant is maintained in another statute also relating to the administration of civil justice. I refer to the Indian Limitation Act, XV of 1877.

That statute in art. 156 of sch. ii provides ninety days for the person who can afford to pay the court fees to appeal under the Code of Civil Procedure, but only thirty days for an appeal by the pauper who cannot afford to pay the court fees.

This is the effect of s. 592 of the Civil Procedure Code read with art. 170 of sch. ii of the Limitation Act, XV of 1877, with the result that whilst a rich man is entitled to ninety days for appealing, the pauper appellant is given only thirty days, that is to say, exactly one-third of the time which the person who can satisfy the demands of the State revenues possesses.

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Nor does the distinction end here. S. 4 of the Limitation Act imperatively requires the Courts to dismiss suits, appeals and applications after the prescribed period when sufficient cause is not shown within the meaning of the second paragraph of s. 5 of that enactment.

The indulgence is shown not to the pauper appellant, but to the appellant who can afford to pay the court fees, as I shall presently show.

I have already said enough to show that this, which to me sitting here as a Judge seems almost an unreasonable distinction between rich litigants and the poor litigants, is by reason of the imperative mandates of the Legislature itself, a provision which seems to me to be beyond any such consideration as I can entertain as a Judge of this Court. But because it is sometimes possible for the Legislature to consider the views which are expressed from the Bench in connection with such cases, I may say that I have failed, even after much anxious consideration, to understand the policy upon which these statutory provisions have been made, and which statutory provisions I am bound to obey; nor do I understand why such provisions were ever made part of the statute law of the land.

As the statute law stands, and it is because it is for a Judge to explain the law and not to make it, I am driven to rule exactly according to the requirements of the statute law.

The application which was admitted by my order, for leave to appeal as a pauper, was an application governed by the provisions of art. 170 of sch. ii of the Limitation Act (XV of 1877). I have already said that I mistook it to be entitled to the same privilege as it might have been entitled to, if it was made by a person who could satisfy the State demand of Government revenue. That order passed by me was an illegal order, and the petitioner is not entitled to the benefits of s. 5 of the Limitation Act, which benefits are limited to the rich who can pay the court fees stamp.

I am all the more convinced that this interpretation of the law is right, because in the first place, in not only art. 170, but also in

the penultimate paragraph of s. 12 of that enactment, a marked distinction is to be observed in the wording of the statute between appeals by the rich man and the appeals or rather applications for leave to appeal when made by paupers. S. 12, in keeping with the other provisions to which I have referred, allows indulgence not to the poor but to the rich, because there it draws a clear distinction between an appeal by one who can pay the court fees and application by a pauper to be allowed to appeal *in formâ pauperis*. So also s. 5 of the same enactment gives every indulgence to the person who can pay court fees, and none to him who cannot pay.

The result of this view is that I, with very much regret, feel that the statute law as contained in s. 5 of the Limitation Act (XV of 1877), which I am bound to follow and enforce, disables me from considering whether or not, under the circumstances of this case, the delay of four days as reported by the office was or was not excusable. The appellant's misfortune might have been similar to the misfortune of one who could pay the court fees, and even if the misfortune consisted in the breaking of a leg, such misfortune might probably be intensified by the circumstaces that she, the appellant, is admittedly a pauper. But so long as the law does not take this circumstance into account, it is not for me, sitting here as one of Her Majesty's Judges, to advise what the law should be, nor to do other than enforce that law.

The matter therefore stands thus. Because the plaintiff-appellant was a pauper and could not pay court fees, therefore her appeal, instead of being governed by ninety days' limitation, was to be governed by thirty days' limitation, and because she was a pauper she was not to be allowed any such deduction in computation or indulgence as s. 5 provides; and that because she is a pauper it does not lie within the power of Her Majesty's Judges, sitting in appeal, to allow her indulgence, or to say whether the delay of four days was or was not justifiable or excusable.

I have said enough to indicate how far, if I was one of the members of the Legislature, I should dissent from such provisions of the law, but being here as a Judge I am bound to follow them

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in order to indicate, as I have often done, to the population within the jurisdiction of this Court, how far laws of limitation are laws which must be strictly enforced, and that they are essentially laws of repose.

Because the plaintiff-appellant did not within the period of limitation provided by art. 170 of Act XV of 1877 apply for leave to appeal to this Court, and because such application for leave to appeal *in formâ pauperis* was delayed by four days, and also because such delay cannot be excused by this Court within the meaning of s. 5, I hold that the appeal is barred by limitation, and that it should be dismissed as such without entering into the question as to the rights of the parties. I would dismiss the appeal with costs.

Appeal dismissed.

1889 *August* 14.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SANT LAL AND ANOTHER (PLAINTIFFS) *v.* UMRAO-UN-NISSA (DEFENDANT).*

Execution of decree—Postponement of sale in execution—Sale held through order for postponement not reaching the conducting officer—Material irregularity in conducting sale—Illegal sale—Civil Procedure Code, s. 311.

The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale, and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void.

Held that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed; that his not being aware of the order was not material; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of s. 311 of the Civil Procedure Code; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor; and that the Court could not confirm the illegal sale, but must hold it to be void. *Sukhdeo Rai* v. *Sheo Ghulam* (1), *Ram Dial* v. *Mahtab Singh* (2), and *Ganga Prasad* v. *Jag Lal Rai* (3), referred to.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

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* First Appeal, No. 69 of 1889, from an order of Munshi Peare Lal, Subordinate Judge of Meerut, dated the 14th August, 1889.

(1) I. L. R., 4 All., 382. (2) I. L. R., 3 All., 701.
(3) I. L. R., 11 All., 333.

Munshi *Jwala Prasad*, for the appellants.

Mr. *Hamid-ullah*, for the respondent.

STRAIGHT, J.—The facts of the case to which this appeal relates are as follow :—A decree was obtained against the judgment-debtor respondent, and an application was made for sale of certain property of hers, and the sale took place on the 29th November, 1888. The respondent applied for the postponement of the sale on the 22nd November, 1888, and an order was made to the effect that if security was given within one week the sale would be postponed. On the 29th November, 1888, the judgment-debtor filed a security-bond, and on that date the Court executing the decree passed an order postponing the sale. Owing to some circumstances for which the judgment-debtor cannot be held responsible, that order of the Court failed to reach the officer conducting the sale. Consequently the sale was held and the decree-holder appellant before us became the purchaser of the property. The judgment-debtor then asked to have the sale set aside on the ground that at the time it took place the conducting officer was incompetent to hold the sale by reason of the order of the 29th November, 1888. To this objection the learned Subordinate Judge has given effect, and holding that there was material irregularity set the sale aside. It is this order that is the subject of the appeal by the decree-holder, the auction-purchaser. It is contended by Mr. *Jwala Prasad*, the learned pleader for the appellant, that the Subordinate Judge was bound to find something more than mere irregularity, and that it lay on him on the evidence produced by the judgment-debtor to come to the conclusion either one way or the other that there had been some substantial loss to the judgment-debtor by reason of the irregularity complained of. I think that the use of the word "irregularity" by the learned Subordinate Judge is misleading, if he intended to say that the case was one which fell within s. 311 of the Code of Civil Procedure. I think it was something more than an irregularity. I think that the sale was an illegal sale just as much as if a Court tried a cause in respect of a subject-matter, which before the date of trial had been removed from its jurisdiction by an authority having power to deprive it of such juris-

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diction. Under the Code of Civil Procedure the officer conducting the execution sale derives his authority and competence entirely from the Court executing the decree, and it is clear from the powers given by the statute to such Court that if it does postpone a sale its order must have the immediate effect of postponing the sale: indeed, if it be not so, most serious complications might arise, and the result would ensue that although a Court having full power to do so had postponed a sale, the officer appointed to conduct it might nevertheless hold such sale. I do not think that the question whether the order of the postponement did or did not reach the officer conducting the sale is of any serious importance. When once the sale was postponed, all power to hold it went out of the officer appointed, and he, though no doubt in this particular case without being aware of it, was *functus officio*. Then the question arises what power have we under the Code to deal with the state of things? I cannot suppose that it was intended that a Court executing a decree was to confirm a sale which had never taken place in the sense that it had taken place without authority, or that it was to refuse to set aside such a sale when brought to its notice. In the case of *Sukhdeo Rai* v. *Shooghulam* (1) I stated, in terms which I believe have been more then once approved of by Judges of this Court, the grounds on which it seemed to me cases of this kind might be dealt with, and in the case of *Ram Dial* v. *Mahtab Singh* (2) which was subsequently confirmed in appeal by their Lordships of the Privy Council, I and my late colleague Mr. Justice Oldfield dealt with a case in a similar manner. There is also a ruling of the learned Chief Justice in the case of *Ganga Prasad* v. *Jag Lal Rai* (3) which adopted a similar view, and there it was held by him, in reference to s. 290, that the terms of that section were not merely directory but mandatory, and under certain circumstances the sale being contrary to law was void, and that this Court, or indeed any Court dealing with such a sale, could not recognise or sustain it. I therefore come to the conclusion that the order of the Subordinate Judge in this case should not be disturbed, its practical

(1) I. L. R., 4 All., 482. (2) I. L. R., 8 All., 701.
(3) I. L. R., 11 All., 333.

effect being to declare the sale of the 29th November, 1888, to be a void sale. The appeal is dismissed with costs.

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TYRRELL, J.—I agree.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Mahmood.

1890 *January* 14.

BENI MADHO (DEFENDANT) *v* BASDEO PATAK AND OTHERS (PLAINTIFFS) *

Hindu law—Joint Hindu family—Mortgage and decree thereon affecting joint family property—Mortgage effected by and decree passed against father only—Father's debt—Effect of mortgage and decree on son's rights and interests.

Where a Hindu son is coming into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree, or affected by the sale certificate.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Jokhu Lal,* for the appellant.

Munshi *Juala Prasad,* for the respondents.

STRAIGHT, J.—This appeal relates to a suit of a by no means uncommon description, brought by the minor sons of a Hindu to avoid a mortgage transaction of the 12th April, 1884, and a decree obtained against their father by the mortgagee for sale of the mortgaged property, by obtaining a declaration that their interests in the property charged were not affected thereby. The mortgage transaction, as I have stated, took place upon the 12th April, 1884, and it was between the appellant Beni Madho, for a consideration of Rs. 8,600 as mortgagee and Kandhya Ram the father of the minor plaintiffs and his brother Bhagantia as mortgagors. The mortgage money was sought to be raised and in fact was raised to satisfy and

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* First Appeal, No. 11 of 1888, from a decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 28th October, 1887.

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pay off a debt due from Bhagantia, the uncle of the plaintiffs, a member of the joint family along with them and their father. The mortgagee having failed to get payment of the mortgage debt, on the 30th March, 1886, obtained a decree against both his mortgagors, for sale of the mortgaged property, and in execution it was attached. Thereupon objections were preferred to such attachment on behalf of the minors, which were disallowed, and in consequence the present suit was instituted upon the 21st July, 1887. The object of this suit is to have it declared that the decree of the 30th March, 1886, obtained by the appellant against the father of the plaintiffs and their uncle, is not binding upon the plaintiffs, nor can their interests in the property attached and threatened with sale be brought to sale. This form of suit, as I have already said, is a well-known one; and their Lordships of the Privy Council have over a long series of years had to give many important rulings upon the subject. No doubt the principle enunciated by them in earlier cases led the Courts in India to take a somewhat narrower view of the rules that should govern in such matters than that which appears to have been since adopted. I think I am correct in saying that down to the point at which the judgment of the late Chief Justice Sir Comer Petheram and myself was delivered, in the case of *Basa Mal* v. *Mahárój Singh* (1), all the decisions of their Lordships of the Privy Council which had been delivered were collected; and we therein stated what appeared to us to be the result of those rulings as formulated in the propositions with which our judgment concluded. Since then there have been several more rulings by their Lordships of the Privy Council; namely: *Simbhunath Panday* v. *Golab Singh* (2), *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (3), *Doulat Ram* v. *Mehr Chand* (4), *Bhagbut Pershad* v. *Musammat Girja Koer* (5), *Meenakshi Naidu* v. *Inmudi Kanaka Ramaya Koonden* (6), and an unreported case of *Rai Babu Mahabir Pershad* v. *Rai Meheswar Nath Sahai*, dated the 20th November, 1889.

(1) I. L. R., 8 All., 205.
(2) L. R., 14 I. A., 77.
(3) L. R., 14 I. A., 84.
(4) L. R., 14 I. A., 187.
(5) L. R., 15 I. A., 99.
(6) L. R., 16 I. A., 1.

In the first of these cases in L R., 14 I. A., p. 77, it was held that, where an execution sale relating to joint family property has taken place under a decree obtained in a suit against the father alone in respect of a mortgage executed by him alone, in which his interest in the property specifically was alone charged and the decree and sale certificate are limited to such interest, no matter what the nature of the debt was, only his interest passed. In the judgment it is remarked :—" Each case must depend upon its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree." This case was followed by my brother Mahmood and myself in *Ram Sahai* v. *Kewal Singh* (1) and in *Raghubar Singh* v. *Lachmi Narain* (2). In the second of their Lordships' decisions in L. R., 14 I. A., p. 84, it was held upon the facts that only the right, title and interest of the father was intended to be sold at the execution sale, and only that interest was actually purchased. It was there said :—" If the whole estate could have been put up for sale, it was not put up. It is not a question of what the Courts could have done or what they ought to have done, but what they did, what was put up for sale and what was purchased. If what was put up for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest." In the third case at p. 187 of L. R., 14 I. A., Daulat Ram, the plaintiff, being the holder of a decree on a mortgage by the managing members of a joint Hindu family, in execution purchased the mortgaged property. Being resisted on obtaining possession under his purchase by the defendants, other members of the same family, he brought this suit to have it declared that such purchase covered included the interests of the defendants. The latter simply defended the suit on the ground that as they were no parties to the mortgage or the suit thereon, the decree and execution sale did not touch their interests. It was held that this contention was of no avail and they were bound. In

(1) I. L. R., 9 All., 672. (2) Weekly Notes, 1887, p. 291.

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the course of the judgment it is said :—" It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff on the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interests of all parties or only the right, title and interest of the two parties, who were made defendants. In the case reported from Volume 5 of the Indian Law Reports, Mr. Justice Pontifex in giving his decision says at page 852 : " It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity) mortgages the whole 16 annas of the ancestral property, then in a suit by the mortgagee, the sale under the decree would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made defendant, and the reason for such decision probably is that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right validly acquired to have the whole 16 annas sold." Elsewhere their Lordships remark as to the facts before them, " When the plaintiff applied to be let into possession under the certificate of sale, the defendants objected. He therefore brought this suit, and the defendants had the opportunity of trying whether the mortgage was a valid mortgage, which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding on them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit and that the two mortgagors alone had been sued. But that ground falls from under them." In a somewhat similar condition of facts my brother Tyrrell and I took the same view, in the case reported in I. L. R., 10 All., 123. In the fourth decision of their Lordships to be found in L. R., 15 I. A., p. 99, it was held that where joint ancestral property has been sold in execution of a decree on a mortgage

executed by a Hindu father, if his sons come into Court to set aside such sale, they must establish that the debt to which the mortgage related was contracted for an immoral purpose, and that it did not rest on the creditors to show that they had made proper inquiry or that the money had been borrowed in a case of necessity. Their Lordships say, "It must be borne in mind that this was not a case of a joint family consisting of brothers, but it was one consisting of fathers and children, and it has been held that sons are liable to pay the debt of their fathers unless incurred for immoral or illegal purposes." The case *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) was referred to and the propositions established by it stated, and then their Lordships continue: "Now although at the time of the sale, notice was given on behalf of the children that the property was joint ancestral property and that the father had no right to mortgage it, still the question arises whether under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to show that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of the children to show that the debt was contracted for an immoral or illegal purpose. If it was necessary to show that the debt was so contracted, the plaintiff failed to prove the fact. It appears to their Lordships that according to the decision in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose. ..... It appears therefore from the decisions that in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution aganist their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to show that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity." In the fifth case, in L. R., 16 I. A., p. 1., the father had executed a single bond for Rs. 2,000 upon which the creditor obtained a simple money decree and attached the whole joint zamíndári interest. The son objected and asked to have his share excluded but failed, and the

(1) L. R., 6 I. A., 104.

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sale went on and the whole estate was sold and purchased by the decree-holder. Then the son brought his suit, not denying that the whole had been sold but impeaching the debt which led to the sale, and asserting that the decree founded on it could not bind his interest. It was held that, failing to make out the grounds on which he brought his suit, it had been rightly dismissed by the Court of first instance. In the unreported case, the question was whether the purchaser at a sale in execution of a decree against the father had purchased the entirety of the zamíndári interest, and it was remarked, "The question is whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shows the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit....., It is hardly possible to make it clear that all parties, judgment-creditors, judgment-debtor, the plaintiff and his advisers and the Court itself considered that the thing put up to sale was the entirety of the estate."

These rulings seem to me to have gone somewhat further than the former ones, and the outcome of the whole of this body of decisions appears to be this, that where a Hindu son is coming into Court to assail either a mortgage made by his father or a decree passed against his father or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security, or dealt with by a decree, it rests upon him, if he seeks to escape from having his interests affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he as the son of a Hindu would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate. Now in this case upon the showing of the learned Judge, there is no proof whatever that the mortgage

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debt of the 12th April 1884, was an immoral debt, that is to say, a debt which according to the Hindu Law the sons of a Hindu would not be under a pious obligation to discharge, or that anything less than the whole zamíndári interest was mortgaged, or that the decree for sale related only to the father and uncle's share. It was alleged in the plaint that the debt was incurred for "bad and immoral purposes," but there is not a particle of proof of that, and the only suggestion appears to be that it was bad and immoral for one brother to pay another's debt. Adopting the principles which their Lordships of the Privy Council have laid down, I think that this suit instead of having been decreed should have been dismissed, and I therefore decree the appeal with costs, and the suit of the plaintiffs will stand dismissed with costs.

MAHMOOD, J.—I am entirely of the same opinion.

Appeal dismissed.

Before Mr. Justice Mahmood.

1889 *August 7.*

SHEOGOBIND AND ANOTHER (PLAINTIFFS) *v.* ABLAKHI AND OTHERS (DEFENDANTS).*

Limitation- Appeal—Act XV of 1877 *(Limitation Act), ss.* 5, 12—*"Time requisite for obtaining a copy of the decree appealed against"—Neglect of Court officials in issuing copies.*

A decree of a lower appellate Court was passed on the 26th March 1888, and an appeal therefrom was presented to the High Court on the 6th July, or twelve days beyond the time allowed by art. 156, sch. ii of the Limitation Act (XV of 1877). An application for a copy of the judgment under appeal was made by the appellants on the 28th March, and the 29th March was fixed by the office as the date when the estimate of the costs of such copy was to be delivered, and it was delivered on that day. The estimate was not complied with until the 5th April, when the appellants put in the necessary stamp paper according to the estimate. Upon the entry of the stamp paper no intimation was made by the office to the appellants as to when the copy would be ready for delivery. The copy was delivered on the 10th April.

Held that under s. 12 of the Limitation Act the appellants were entitled to a deduction of the whole period between the 28th March and the 10th April, and that, if this were not so, the appeal should be admitted under s. 5 of the Act.

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* Second Appeal No. 996 of 1888, from the decree of W. T. Martin, Esq., District Judge of Mirzapur, dated 26th March 1888, modifying the decree of Munshi Madho Lal, Subordinate Judge of Mirzapur, dated 9th November 1887.

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The words in s. 12, "the time requisite for obtaining a copy of the decree appealed against" imply that the appellant is not to lose his right of appeal by reason of the neglect of the officials who issue copies or who are required to give notice when such copies are ready.

THE facts of this case are stated in the judgment of Mahmood, J.

Mr. *Niblett*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

MAHMOOD, J.—Before I can dispose of this case finally, I consider it necessary to remand the case, under s. 566 of the Civil Procedure Code, for clear findings upon certain points, but in order to explain them it is necessary to state certain facts, upon which the following genealogical table throws light :—

Parmeshar Dat.

Musammat Bachi (concubine, defendant No. 3), Mata Prasad (son, defendant No. 4).	Narain (son, defendant No. 2).	Musammat Ablakhi (widow, defendant No. 1).

On the 21st May 1883, Musammat Ablakhi, defendant No. 1, for herself and as guardian of her minor son Narain, defendant No. 2, executed a hypothecation bond in favour of Sheo Gobind and Parsotam, plaintiffs-respondents, in respect of a grove and a house situate therein. The money due upon the bond was not paid, and the present suit was instituted by the plaintiffs on the 19th May 1887 for recovery of money due upon the bond of the 21st May 1883, by enforcement of lien.

In the suit Musammat Bachi, who has been found to be the concubine of the deceased Parmeshar Dat, was impleaded as defendant No. 3, and her son by Parmeshar Dat, namely, Mata Prasad, was impleaded as defendant No. 4.

Both Musammat Bachi and her son Mata Prasad resisted the suit upon the ground that they had been in proprietary possession adverse to the mortgagors Musammat Ablakhi and Narain, defend-

ants Nos. 1 and 2, and that their rights were therefore not affected by the hypothecation of the 21st May 1883.

The Court of first instance decreed the claim as against Musammat Ablakhi, defendant No. 1, and Narain, defendant No. 2, but exempted the property and person of Musammat Bachi, defendant No. 3, and Mata Prasad, defendant No. 4.

The plaintiffs appealed to the lower appellate Court, which has recorded a judgment which does not fully satisfy the specific requirements of s. 574 of the Civil Procedure Code. The effect, however, of the decree passed by that Court was to modify the first Court's decree by exempting the house, but allowing the decree to be enforced against the grove.

From the decree of the lower appellate Court Musammat Bachi, defendant No. 3, and Mata Prasad, defendant No. 4, have preferred this second appeal, and an inordinately large amount of time of this Court has been taken up in hearing the argument addressed to me by Mr. *Sundar Lal* in support of the preliminary objection to the effect that the appeal was barred by limitation and could not therefore be heard.

Before I proceed any further I wish to state exactly the line of thought which induced the learned Pandit to devote so much time to the point which does not appear to me too difficult to decide. The argument of the learned Pandit proceeds upon the following facts:—

The case was decided by the learned Judge of the lower appellate Court on the 26th March 1888, and the appeal was not preferred till the 6th July 1888, thus giving an interval of 102 days, that is to say, twelve days beyond the limitation allowed by art. 156 of sch. ii of the Limitation Act (XV of 1877), which provides only 90 days.

The learned Pandit in placing his case before me admits that s. 12 of the Limitation Act is applicable, and that thereunder the appellants are entitled to the exclusion of "the time requisite for obtaining a copy of the decree appealed against." This the learned Pandit

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argues the defendants were fully entitled to; but his argument rests upon these facts:—

The application to obtain a copy of the judgment appealed from was made on the 28th March 1888, and the next day, namely, the 29th March 1888, was fixed by the office as the date when the estimate as to the costs of such copy were to be delivered. The estimate was so delivered on that day.

It is admitted that the estimate so delivered was not complied with immediately; but what did actually happen was that on the 5th April 1888 the defendants-appellants put in the stamp paper requisite according to the estimate for copies which they had applied for so long before as the 28th March 1888. Upon the entry of the stamp papers no kind of intimation was given to the defendants-appellants as to the period when the copy would be ready for delivery to the appellants who had applied for it so long before as the 28th March 1888, but as a matter of fact the copy was delivered on the 10th April 1888.

Mr. *Sundar Lal* in the long and elaborate argument which he has addressed to me has argued that although if the period between the 28th March and the 10th April 1888 is to be excluded the appeal is within limitation, yet out of this period I must deduct the period between the 29th March 1888 and the 5th April 1888, that is to say, the period when the estimate was given and the period when the stamp paper was filed, and the learned pleader contends that even under the circumstances of this case this period was not necessary, and that even the provisions of s. 5 of the Limitation Act which enable the appellate Court to entertain an appeal are inapplicable to the present case.

I have listened to the argument in support of the preliminary objection with much interest, and I may say with sufficient patience, but I have no doubt that the argument has no force.

The whole of the argument addressed to me relates to the interpretation of some English words, namely, the words "*the time requisite for obtaining a copy of the decree appealed against*"

as they occur in the second paragraph of s. 12. I have no doubt that the word "*requisite*" makes it possible for the appellant to require its meaning to be such that he should not lose the right of appeal either by reason of the neglect of the officials who issue copies or those who are required to give notice when such copies are ready. The word "*requisite*" as it occurs in the section, in my opinion, includes under the circumstances of the case the whole period intervening between the 28th March 1888, when the application for copy was made, and the 10th April 1888, when it was actually delivered. I say so because in this case no date was fixed by the officers of the Court below either as to the date when the copy would be ready or as to the date when it would be delivered; and the copy itself was not delivered until the 10th April 1888.

But there is quite another aspect of the matter, and it relates to the interpretation of s. 5 of the Limitation Act, XV of 1877.

It is not for me to lay down any rule which will be binding upon the other Judges of this Court, but it is within my powers to say that in this case ample reasons exist, even if my views as to the interpretation of s. 12 do not meet with their approval, to require the exercise of the discretionary powers conferred by s. 5 of the enactment.

The preliminary objection as to the appeal being barred by limitation being thus disallowed, I have to hear the case upon the merits and explain the order which I should make.

In dealing with the case in this manner I do not think any satisfactory judgment can be delivered by me without clear findings upon the following points :—

(1) When did Parmeshar Dat die?

(2) For what length of time have the defendants been in possession of the house and grove in suit?

(3) What has been the nature of such possession as to its being adverse or otherwise to Musammat Ablakhi and Narain who are mortgagors to the plaintiffs-respondents?

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I wish to add that it was at the express request of Mr. *Niblett* for the appellants that the case has been heard without any one being impleaded as party-respondent representing the deceased Parsotam, as stated in my order of to-day. The proceedings therefore will not affect the heirs, if any, of the deceased respondent Parsotam.

I remand the case under s. 566 of the Civil Procedure Code to the lower appellate Court for clear findings upon the above points, and upon receipt of the findings ten days will be allowed to the parties for objections under s. 567 of the Code.

Issues remitted.

1889 *November* 8.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Brodhurst.

IBN HUSAIN AND ANOTHER (PLAINTIFFS) *v.* RAMDAI AND OTHERS (DEFENDANTS).*

Contribution, suit for—Joinder of parties—Joinder of causes of action—Limitation—Charge—Act XV of 1877 *(Limitation Act), sch. ii, Nos.* 99, 120, 132.

Where the owner of two villages sold under a decree obtained upon a mortgage, claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them all collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for contribution against the separate owners. *Hira Chand* v. *Abdul* (1), distinguished. *Rujaput Rai* v *Mahomed Ali Khan* (2), *Tavasi Telavar* v. *Palani Andi Telavar* (3), *Khema Debia* v. *Kamola Kant Bukhshee* (4) and *Eglinton* v. *Koylashnath Mozoomdar* (5), referred to.

He may also bring a single suit in respect of the two sales, and is not bound to bring a separate suit in respect of each sale.

The owners of the other villages included in the mortgage are liable to contribution; and the owner of the property sold is entitled to a charge on those other villages in respect of the several amounts to be contributed; and the suit for contribution is governed by the limitation provided by art. 132 and not by that provided by art. 99 or art. 120 of sch. ii. of the Limitation Act (XV of 1877) and must be instituted within twelve years from the date of confirmation of the sale. *Ram Dutt Singh* v. *Horakh Narain Singh* (6), and *Pancham Singh* v. *Ali Ahmad* (7) referred to.

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* First Appeal No. 207 of 1887 from a decree of Munshi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 15th August 1887.

(1) I. L. R., 1 All. 455.
(2) 5 N.-W. P., 215.
(3) 3 Mad. H. C. Rep., 187.
(4) 10 B. L. R., 259, Note.
(5) W. R., 1864, p. 303.

THE facts of this case were as follows:—

The plaintiff No. 1, Saiyid Ibn Hasan, was the purchaser of two villages, mauza Basanta and mauza Tanda Mahidaswala, at sales in execution of decrees against one Kadir Ali Khan. The sales were confirmed in May 1874. The plaintiff No. 2, Saiyid Wilayat Ali Khan, claimed by purchase from Saiyid Ibn Hasan.

At the time when the sales were held, the two villages had been hypothecated, with twenty-nine others, under deeds of simple mortgage dated respectively the 12th December 1867 and the 28th April 1873, and executed by Kadir Ali Khan and his wife Umrao Begam in favour of the defendant No. 1, Raja Sheoraj Singh. The mortgagee sued upon these deeds, and on the 13th November 1873 he obtained two decrees, in which the sale of the thirty-one villages, including Basanta and Tanda Mahideswala, was directed. The amount due under these decrees was, in all, Rs. 67,064-6-9.

On the 20th June 1874, the decree-holder brought to sale the villages Basanta and Tanda Mahideswala in execution of one of his decrees, and the sales were confirmed on the 5th August 1874. The former village was sold for Rs. 9,500 and the latter for Rs. 16,000, the total amount realized by the sale being thus Rs. 25,500.

The present suit was instituted by the plaintiffs on the 21st June 1886 in the Court of the Subordinate Judge of Moradabad. In it they claimed contribution from the owners (twelve in number) of the other twenty-nine villages included in the mortgage, and which the decree had directed to be sold. The claim was not for one lump sum claimed generally as contribution from all the defendants collectively, but a document annexed to the plaint specified, in regard to each of the twenty-nine villages owned by the defendants, the proportion of contribution claimed by the plaintiffs in respect thereof.

The defendants pleaded, *inter alia*, that the suit was barred by limitation, and was bad for misjoinder. On the first point the Subordinate Judge decided in favour of the plaintiffs, holding that the suit

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was governed by art. 132 and not by art. 99 of sch. ii. of the Limitation Act (XV of 1877), and, having been brought within twelve years from the 5th August 1874, the date of the confirmation of the sales of Basanta and Tanda Mahideswala in execution, was within time. In regard to the second point the Subordinate Judge held that the suit was bad for misjoinder. After referring to the case of *Hira Chand* v. *Abdal* (1), as authority for the proposition that a separate suit should have been brought against each of the owners of the twenty-nine villages, the Subordinate Judge continued :—

"Now the present suit has been brought seeking collectively for contribution in respect of several villages from a number of defendants, though the cause of action against each of the defendants was altogether separate, and the defences made by most of the defendants are such that they have no connection with those made by some of the others. Such a procedure cannot in any way be held to be proper. It is to be observed that the villages Basanta and Tanda Mahideswala were sold in separate lots, that is, each village was sold separately, and the sale certificate was also obtained separately .....In short the cause of action as against all the defendants was not at all one, and yet the plaintiffs seek adjudication of their case against all of them. In my opinion, by reason of the causes of action being different, the claim of the plaintiffs, as brought against all the defendants, cannot be heard and tried, and as my finding on the second issue is that the plaintiffs' claim as brought should be dismissed for misjoinder and multifariousness, it is not necessary, I think, to express any opinion regarding the other issues."

From this decree the plaintiffs appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, Babu *Ratan Chand* and Mir *Zahur Husain*, for the respondents.

EDGE, C.J., and BRODHURST, J.—This was a suit for contribution, in which the plaintiffs claimed contribution proportionately from the defendants, and not one lump sum as against all. It arose out of a sale of two villages. The two villages were sold on the

(1) I. L. R., All., 455.

same day, but the sales were confirmed on different dates. The sales were confirmed within twelve years before this suit. Those villages and others were sold under a decree obtained on a mortgage. Those two villages and the villages which are alleged to be the property of the defendants were hypothecated by that mortgage. The Subordinate Judge dismissed the suit on the ground of misjoinder, but found in favour of the plaintiffs on the question of limitation. In dealing with the question of misjoinder, anything that we may say must not prejudice the hearing of the suit. For present purposes we only assume that the facts are correctly stated in the plaint. It is said that there was misjoinder in two respects, namely, that the sales of the two villages being distinct sales gave rise to two separate and distinct causes of action, and that even in respect of either of the sales the plaintiffs were bound to sue in a separate action the separate owners of the other villages.

To deal with the last objection first, we have seen no authority for the proposition that the owner of the village sold under a decree obtained under a mortgage must bring separate suits for contribution against separate owners of the other properties included in the mortgage. The Subordinate Judge relied on a judgment of this Court in the case of *Hira Chand* v. *Abdal* (1). That case has been misunderstood by the Subordinate Judge. What was decided there was that the purchaser of a share in a mortgaged estate who had paid off the whole of the mortgaged debt in order to save the estate from foreclosure, could not claim from the other mortgagors collectively one lump sum as contribution. The other mortgagors would not be liable for the lump sum. They would respectively be only liable proportionately. We have been referred to three cases in support of this view, that all the contributors may be joined in one suit. In the case of *Rujaput Rai* v. *Mahomed Ali Khan* (2) this Court held that on the ground of convenience all contributors might be made parties to the suit. The case of *Tavasi Telavar* v. *Palani Andi Telavar* (3), the case of *Khema Debia* v. *Kumola Kant Bukhshee* (4) and the case of *Eglinton* v. *Koylashnath*

(1) I. L. R., 1 All., 455.
(2) N.-W. P. H. C. Rep., 1873, p. 215.
(3) 3 Mad. H C. Rep, 187.
(4) 10 B L. R., 259, Note.

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Mozoomdar (1) are authorities to show that persons liable to contribute may all be joined in one suit. A similar view was taken by this Court in the case of *Musammat Bachcha Kuari* v. *Bhora Ishur Singh*, F. A. No. 22 of 1888.

As to the second point, it appears to us that under the circumstances of this case common sense points to the course adopted by the plaintiffs being the right one, and that they were not liable to have the suit dismissed for misjoinder on either of the grounds contended for before us. If two separate suits had been brought, the defendants in one suit would also have been defendants in the other, and the same questions in the settlement of accounts would have to be considered in each suit. So far we are of opinion that the appeal should succeed.

Mr. *Jogindro Nath*, who appears for some of the respondents, has, under s. 561 of the Code of Civil Procedure, attempted to support the decree on a ground decided against his client in the Court below; that is to say, he has contended that art. 99 or art. 120 and not art. 132 of the second schedule of the Limitation Act applies to this case.

It is quite clear that art. 99 does not apply; this is not a case where a person has paid money due under a joint decree, nor is it a suit by a sharer in a joint estate suing for contribution for revenue paid by him. If art. 132 applies, art. 120 cannot. In our opinion the other villages were liable for contribution in this case, and liable so as to bring this case within art. 132. The case of *Ram Dutt Singh* v. *Horakh Narain Singh* (2) is an authority to show that in such a case as this art. 132 would apply. The case of *Pancham Singh* v. *Ali Ahmad* (3) goes to show that the owners of these two villages would be entitled to a charge on the other villages in respect of the several amounts to be contributed. This case is one which we think is provided for by art. 132. We disallow the objections without costs, and allow the appeal. Costs of this appeal

(1) W. R., 1864, p. 303.
(2) I. L. R., 6 Calc., 519.
(3) I. L. R., 4 All., 58.

to abide the result. We remand the case, under s. 562 of the Code of Civil Procedure.

Cause remanded.

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IBN HUSAIN *v.* RAMDAI.

Before Sir John Edge, K.t, Chief Justice, and Mr. Justice Tyrrell.

TEYEN (DEFENDANT) *v.* RAM LAL (PLAINTIFF).*

1890 *January* 31.

Judicial officers, liability of—Act XVIII of 1850—*Judicial act within the limits of the officer's jurisdiction—Such act protected though done erroneously, illegally or not in good faith—"Jurisdiction."*

Under Act XVIII of 1850, where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly or even illegally or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it.

The word "jurisdiction" is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder* v. *Halket* (1). It means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. A judicial officer who in the discharge of his judicial duties issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction in this sense.

Where a Magistrate of the first class having sentenced an accused person to three years' rigorous imprisonment and Rs. 500 fine under ss. 379 and 411 of the Penal Code, and having issued a warrant purporting to act under s. 386 of the Criminal Procedure Code, for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, schedule V and s. 554 of the Code, and Form D in Chapter V of the Circular Orders of the High Court,—*held* that he was acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that, under such circumstances, it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850.

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* Second Appeal No. 305 of 1888, from a decree of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 2nd February 1888, reversing a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 2nd March 1887.

(1) 2 Moo. I. A. 293.

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v.
RAM LAL.

THE facts of this case were as follows :—

The defendant, Mr. L. W. Teyen, was a Deputy Magistrate at Fatehpur, and on the 14th May 1885 he convicted the plaintiff Ram Lal, a zamindár of the same district, of offences punishable under ss. 379 and 411 of the Penal Code, and sentenced him to three years' rigorous imprisonment and Rs. 500 fine. On appeal the conviction and sentence were set aside by the Sessions Judge of Cawnpore on the 3rd July 1885.

On the 16th May 1885 the defendant caused a notification to be issued for the sale of certain moveable property belonging to the plaintiff, in realization of the fine. This notification was not in the form prescribed by schedule V, No. XXXVII of the Criminal Procedure Code, with reference to s. 386 of the same Code. It was in the following terms :—

"As the following moveable property belonging to Ram Lal Thakur has been attached in default of payment of Rs. 500 fine, through the police of Fatehpur and brought to this tahsíl for sale, this notification, giving ten days, is issued; and it is notified that if the fine is not paid within the period fixed herein, the attached property shall be sold at this tahsíl, on Tuesday, the 26th May 1885. Any person who has any objection to the sale of the attached property must file it in Court within the period specified in this notification."

Appended to this notification was a list of the property to be sold. It consisted principally of two mares, two buffaloes, five bullocks and a cow with calf.

On the 19th and 20th May 1885 and at his Court at Fatehpur (*i.e.*, at a time and place other than those specified in the notification), the defendant had the property put up for sale by auction, and the sale realized Rs. 360-0-3.

On the 9th April 1886 the plaintiff instituted the present suit in the Court of the Subordinate Judge of Cawnpore. The plaint alleged that the defendant in selling property before the date fixed in the notification had acted maliciously and in bad faith, illegally,

and without jurisdiction, and that in consequence of such action intending purchasers were unable to be present at the sale, and the loss thereby occasioned to the plaintiff was Rs. 1,500. The claim was for damages of this amount.

The defendant pleaded, *inter alia*, "that whatever action he took in the case of Queen-Empress *v.* Ram Lal, charged under ss. 379 and 411 of the Indian Penal Code, was taken by him in good faith, and according to the best of his judgment and ability," and "that the sale of the defendant's moveable property was conducted under s. 386 of the Criminal Procedure Code, and as the property consisted of live stock, it became necessary to sell it sooner, so as to avoid the cost of their maintenance."

The Court of first instance dismissed the claim on the ground that the suit was barred by Act XVIII of 1850, the acts complained of having been done by the defendant in the discharge of his judicial duty, and, though irregular and improper, not beyond his jurisdiction. The Court, however, did not allow costs to the defendant.

From the decree of the Subordinate Judge, the plaintiff appealed to the District Judge of Cawnpore. The material portion of the Judge's judgment was as follows:—

"The property was sold in disregard of s. 554 of the Criminal Procedure Code, and of form 37, Schedule V of the Code; also in disregard of Form D, Chapter V, Criminal Circulars of the High Court, having the force of law under s. 553 of the Criminal Procedure Code.

"No time was allowed for the plaintiff to pay in the fine inflicted on him, nor were the time and place of sale notified to purchasers. It is contended for the defendant that s. 386 of the Criminal Procedure Code invests the defendant with jurisdiction to sell, and that the other provisions of the Code are mere subsidiary matters, and the neglect of them merely an irregularity not affecting jurisdiction. I cannot adopt this view. The conditions materially affect the position of the convicted person and the price of the goods sold. The defendant, in selling the plaintiff's property, was bound to

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fulfil all material conditions of the law which gave him the power to sell.

"I find that the defendant had no jurisdiction to sell the plaintiff's property in the manner he did. It remains to enquire whether the defendant in good faith believed himself to have power to sell the property as he did. He does not plead ignorance of the law, but he urges that the animals had to be sold as soon as possible in order to avoid the costs of their maintenance. No authority is quoted justifying such a procedure. It is not shown that this is the usual procedure. On the contrary, there is evidence that proclamations for sale issue as a matter of course in the Fatehpur district. It is in evidence that the tahsíldár obtained sanction from Mr. Teyen for the issue of a proclamation, and actually issued one, naming the tahsíl as the place of sale of this property, and that subsequently Mr. Teyen sent for the property, and sold it at once at his own kachahri. The plaintiff's pleader has deposed that he gave a petition asking for time to pay the fine up to the date fixed for sale, that the defendant was unwilling to receive it, that he, the pleader, placed it on the table and left. That petition is not now forthcoming. I see no reason to doubt this evidence, and it should have drawn the defendant's attention to the law and facts regarding the sale. There is evidence produced to show that one Thakur Prasad, an Honorary Magistrate, and the police, are hostile to the plaintiff, that the defendant had probably been biassed against the plaintiff by private information from these persons, that the defendant showed animus against the plaintiff in conversation with his friends, that he disclosed an opinion unfavourable to the plaintiff's case before any evidence had been taken, that he expressed displeasure at one of the witnesses supporting the plaintiff and assisting him.

"It may be that the defendant believed the plaintiff to be a person of bad character, but if he did so, it was still his duty to take care that the plaintiff was in no way prejudiced by this opinion in any case coming before him, and in such a case the defendant should have been more than usually careful to comply with the conditions of the law. The defendant has not used due care and attention in

this matter, and I find that he did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner he did. On the question of damages, the average price of the gray mare is stated to be Rs. 500, of the bay mare Rs. 450, of the bullocks Rs. 170 or Rs. 200 per pair, of the bullock Rs. 70, of the buffaloes Rs. 53 and Rs. 45, and of the cow Rs. 45. The entire property sold for Rs. 360-0-3. I assess damages at Rs. 1,200.

"The decree of the lower Court is reversed, and Rs. 1,200 is decreed in the appellant's favour, with costs of both Courts."

The defendant appealed to the High Court.

Mr. *J. E. Howard* and Mr. *Dwarka Nath Banerji*, for the appellant.

Mr. *W. M. Colvin*, Mr. *A. H. S. Reid*, and Pandit *Bishambhar Nath*, for the respondent.

EDGE, C.J., and TYRRELL, J.—The suit out of which this second appeal arose was brought by Thakur Ram Lal against L. W. Teyen, a Magistrate of the first class, to recover damages for the sale by the defendant of two mares, five bullocks, one cow with calf, and two buffaloes, the property of the plaintiff, on the allegation that the defendant had, in bad faith and maliciously and without any sufficient cause, illegally and without authority sold the property in question before the date fixed for the sale, by reason whereof the plaintiff had suffered the damages claimed.

The defendant pleaded that he, when acting as a Deputy Magistrate in the Fatehpur district, had sentenced the plaintiff to three years' rigorous imprisonment and a fine of Rs. 500, under ss. 379 and 411 of the Indian Penal Code, which conviction and sentence he admitted had been set aside by the Sessions Judge of Cawnpore. The defendant also, amongst other things, alleged that such action as he had taken in the matter was taken in good faith by him and according to the best of his judgment and ability; that the sale was conducted under s. 386 of the Code of Criminal Procedure; and that it became necessary to sell the animals earlier than the date fixed

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for the sale so as to avoid the costs of their maintenance; and relied upon Act XVIII of 1850.

The then Subordinate Judge of Cawnpore, being of opinion that Act XVIII of 1850 was a bar to the suit, by his decree dismissed the suit, but without costs.

From that decree the plaintiff appealed. On appeal the then Judge of Cawnpore found that the defendant had no jurisdiction to sell the plaintiff's property in the manner in which he had sold it; that the defendant had not used due care and attention in the matter, and did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner in which he had sold it.

The Judge of Cawnpore allowed the appeal, and assessing the damages at Rs. 1,200, gave the plaintiff a decree for Rs. 1,200 with costs of both Courts.

From that decree this second appeal has been brought.

The Judge of Cawnpore and the Subordinate Judge differed as to the construction of Act XVIII of 1850.

Act XVIII of 1850 is as follows:—

"An Act for the protection of Judicial Officers.

"For the greater protection of Magistrates and others acting judicially.

"It is enacted as follows:—

"I. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant

or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The Judge of Cawnpore considered that inasmuch as the sale was not in conformity with Form 37, schedule V, and s. 554 of the Code of Criminal Procedure, and Form D in Chapter V of the Circular Orders of this Court, the acts complained of were not done or ordered to be done within the limits of the defendant's jurisdiction as a Magistrate of the first class. In other words, the Judge of Cawnpore considered that an act done or ordered to be done by a Magistrate in the discharge of his judicial duty could not be treated as done or ordered to be done by him within the limits of his jurisdiction, if in doing such act or ordering it to be done he did not comply with the provisions of the law, which required that the act should be done in a particular manner.

If that construction of the Act is correct, this appeal must, on the finding of fact of the Judge of Cawnpore, that the defendant did not in good faith believe that he had jurisdiction to sell the plaintiff's property in the manner in which he sold it, be dismissed. If, on the other hand, that construction of the Act be not correct, that finding of fact is immaterial, as there can be no doubt that in sentencing the plaintiff to imprisonment and fine of Rs. 500, and in issuing his warrant for the levy of the amount by distress or sale of the moveable property belonging to the plaintiff, the defendant was acting in the discharge of his judicial duties as a Magistrate of the first class, whether or not he discharged those duties irregularly or even illegally.

Mr. *Banerji* for the appellant referred us to s. 386 of the Code of Criminal Procedure and the cases of *Meghraj* v. *Zakir Husain* (1), *Calder* v. *Halket* (2), *The Collector of Hooghly* v. *Tarak Nath Mukhopadhya* (3), *Fray* v. *Blackburn* (4), *Dhan Singh* v. *Basant Singh* (5) and Maxwell, pp. 67 and 385.

Mr. *Reid* and Pandit *Bishambhar Nath* for the respondent referred us to the cases of *Queen* v. *Shahon* (6), *Ammiappa Mudali*

(1) I. L. R., 1 All., 280.
(2) 2 Moo. I. A., 293.
(3) 7 B. L. R., 449.
(4) 3 B. & S., 576.
(5) I. L. R., 8 All., 519.
(6) 11 W. R., Cr. 19.

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v. *Mahomed Mustafa Sáib* (1), *Ashburner* v. *Keshav Valad Tuku Patil* (2) and *Collector of Sea Customs, Madras*, v. *Punniar Chithambaram* (3).

It was at first contended that the Judge of Cawnpore having found that the defendant did not in good faith believe himself to have jurisdiction, it was immaterial whether the act done or ordered to be done was "within the limits of his jurisdiction." That contention was properly abandoned on its being pointed out to counsel that such a reading of the Act would lead to the inference that a Judge or Magistrate would be liable to be sued for an act done by him in the discharge of his judicial duties, although the law imposed upon him the duty of doing such act, and such act was done in strict conformity with the law, if at the time of doing the act he did not *bonâ fide* believe that he had jurisdiction to do or order the act complained of, and would make the protection which the Act was intended to afford to Judges, Magistrates and others acting in the discharge of judicial duties depend in all cases on the ignorance of the Judge or Magistrate or other person of the law, and not upon his having acted in conformity with the law.

In construing the Act, the first principle of construction must, if the Act is susceptible of it, be observed, and the same meaning be applied to the term "jurisdiction" wherever it occurs.

What is the meaning of that term where it first occurs? The Act was passed "for the greater protection of Magistrates and others acting judicially," and is entitled "An Act for the protection of Judicial Officers." There could have been no necessity to pass an Act to protect a Judge, Magistrate or other person who in the discharge of his judicial duties acted as the law required him to act and in conformity with the law. The law could not make a judicial officer liable to a suit for acting in conformity with the law. Prior to Act XVIII of 1850, the Acts which afforded protection to judicial officers in India were, so far as we are aware, the 13 Geo.

(1) 2 Mad. H. C. R., 443. (2) 4 Bom. H. C. R., A. C., 150.
(3) I. L. R., 1 Mad., 89.

III, c. 63, and the 21 Geo. III, c. 70. S. 24 of the 21 Geo. III, c. 70, is as follows:—

"And whereas it is reasonable to render the provincial Magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted: That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country Courts for any judgment, decree or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court."

In 1839 the Judicial Committee of the Privy Council in the case of *Calder* v. *Halket* (1) judicially interpreted that section. The Judicial Committee considered that the object of that section was to protect Judges of the Native Courts from actions for things done within their jurisdiction, though erroneously or irregularly done, leaving them liable for things done wholly without jurisdiction. It is obvious that in using the term "jurisdiction" in that case the Judicial Committee did not use it in the sense of authority or power to do an act in a particular manner, but in the sense of authority or power to act in the matter. Act XVIII of 1850 not only protected judicial officers from suits for acts done or ordered to be done by them in the discharge of judicial duties within the limits of their jurisdiction, but extended the protection which had to that extent, according to the Judicial Committee of the Privy Council in *Calder* v. *Halket* (1), been afforded to them by s. 24 of the 21 Geo. III, c. 70, by further protecting them from suits for acts done or ordered to be done by them in the discharge of judicial duties, without the limits of their jurisdiction, provided that in such last case the officer at the time of doing the act or ordering it to be done in good faith believed himself to have jurisdiction to do or order the act complained of.

We presume that the Legislature in passing Act XVIII of 1850 had in mind the decision of the Privy Council in *Calder* v. *Halket* (1) and intentionally used the term "jurisdiction" in the sense in which it had been used by their Lordships of the Privy Council in that case.

(1) Moo. I. A. 293.

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The concluding portion of Act XVIII of 1850 leads us also to that conclusion. If the term "jurisdiction" in that concluding paragraph were to be construed as meaning authority or power to issue the warrant in the particular matter and in the particular manner or form in which it was issued, the officer or person executing the warrant would under the section obtain no greater protection than the law, without the aid of Act XVIII of 1850, already afforded him, the protection being extended only to an "officer of any Court or other person bound to execute the lawful warrant," &c. The protection to such officer or person afforded by the section was not against suits for executing lawful warrants or orders, but against suits for executing warrants or orders which were not lawful, provided that such warrant or order was issued by a judicial officer in a matter within his jurisdiction, and not merely in a matter in which such judicial officer had authority or power to issue the particular warrant.

This Court, in the case of *Meghraj* v. *Zakir Husain* (1) in considering Act XVIII of 1850, decided that no person acting judicially was liable to be sued for an act done or ordered to be done by him in the discharge of his judicial duty within the limits of his jurisdiction, and that in such a case the question of good faith did not arise. That, so far as we are aware, was the only case prior to that now under consideration in which this Court has had to construe Act XVIII of 1850.

In the case of *Collector of Sea Customs, Madras* v. *Punniar Chithambaram* (2) the defendant appellant, who was Collector of Sea Customs at Madras, professing to act under s. 24 of Act VI of 1863, imposed a fine upon the plaintiff, over whom he had no jurisdiction, and seized the property of the plaintiff with a view to realizing the fine. The Collector was held not to have been protected by Act XVIII of 1850, because he had no *bonâ fide* belief that he had jurisdiction. The judgment of Sir Walter Morgan, C.J., in that case is instructive on the point under consideration here. We extract two passages from that judgment as showing, as

(1) I. L. R., 1 All. 280. (2) I. L. R., Mad. 89.

we understand that judgment, that Sir Walter Morgan construed Act XVIII of 1850 as we construe it. Those passages are as follows :—

"The illegal imposition and levy of the fine is the alleged cause of action. There is no allegation in the plaint, except incidentally in the prayer for relief, that the Collector acted maliciously and without reasonable or probable cause. With reference to this, the first and fourth issues were apparently framed to raise the question whether the Collector, unless shown to be actuated by corrupt and malicious motives, was liable to suit. These issues were, on the assumption that the Collector acted judicially, properly regarded by the Court below as immaterial. His act being in its nature judicial, if we assume in his favour that he acted within his jurisdiction, this would not, in my judgment, render him liable to suit even though the act was done maliciously. If, on the other hand, he acted without jurisdiction his liability would depend, not on whether the act was malicious and without reasonable and probable cause, but on whether it was within the protection of Act XVIII of 1850.

"The *bonâ fide* belief which this Act of 1850 requires in those whom it protects from liability to suit in respect of acts done without jurisdiction, is of a different kind. A belief based on no probable or plausible grounds and arrived at inconsiderately and without due inquiry cannot be considered a belief in good faith within the meaning of the Act, which has been construed in several cases to require reasonable care and attention in the performance of his official duty on the part of him who does or orders the act complained of. It is difficult to suppose that the appellant in his proceedings could have given due consideration to the extent of his powers or endeavoured to inform himself on the subject. Certainly we cannot infer that he did so merely from the fact that his acts were fully known to the Government Solicitor, and at a later period to his official superiors.

"Each case of this sort must no doubt be treated on its own circumstances. But we are bound, I think, to hold according to

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the received construction of the Act that the error, whether it be one of law or of fact, must, to be protected or excused, be shown to rest on some foundation of reason."

In the case of *The Collector of Hooghly* v. *Tarak Nath Mukhopadhya* (1) the plaintiff sued a Magistrate for damages occasioned to him by the cutting of his *band* at the Magistrate's order. The High Court at Calcutta held that the Magistrate was acting judicially and with jurisdiction (though under the circumstance carelessly and irregularly), and was therefore protected by Act XVIII of 1850 from the action for damages. The judgment in that case is a long one, and we need refer only to the following passages in the judgment which are to be found at pp. 484-5 of the report :—

"Although we consider it clear that the procedure prescribed by Chapter XX was observed as little as it could well be by anybody acting under that chapter at all, still, as the Deputy Magistrate did, as the lower appellate Court finds he did, in fact act under Chapter XX and did call upon the plaintiff to show cause, and did hold a sort of inquiry (however irregular) through the police, we do not think we can say that the Deputy Magistrate was not proceeding judicially. We think he was proceeding judicially, though carelessly and irregularly.

"Then was the cutting of the *band* an act within his jurisdiction? We take it for granted that it was, if he had proceeded regularly under Chapter XX. But does the irregularity or incompleteness of this procedure so affect the matter that the jurisdiction did not attach? For the same reasons which induce us to hold that the proceeding was a judicial proceeding though irregular, we hold that the Deputy Magistrate was acting with jurisdiction. As the Deputy Magistrate, acting on the report of the overseer, considered it necessary that the *band* should be removed, and as he under s. 308 passed an order calling upon the plaintiff to remove it, or show cause to the contrary within seven days, and as there was in fact a species of inquiry through the police, we think that the jurisdiction attached,

(1) 7 B. L. R., 449.

and that the Deputy Magistrate cannot be held to have acted without jurisdiction. On the whole, as we must accept it as a fact that the Deputy Magistrate in cutting the *band* was acting under Chapter XX of the Criminal Procedure Code, we are of opinion that he did act judicially and with jurisdiction, and therefore that he ought not in this suit to have been held liable in damages to the plaintiff."

The observations of Norman, J., in the case of the *Queen* v. *Shahon* (1), were, so far as Act XVIII of 1850 was concerned, clearly *obiter*.

It does not appear from the report of the case of *Ammiappa* v. *Mahomed Mustafa Saib* (2), whether or not the learned Judges in that case were considering the provisions of Act XVIII of 1850.

In the case of *Vinayak Divakar* v. *Bai Itcha* (3), the Court held that for the order of the Magistrate, in respect of the carrying out of which the suit against the Magistrate was brought, there was not a shadow of legal foundation; and, further, that the order was made by the Magistrate for the purpose of placing undue pressure upon the plaintiff's husband.

The case of *Venkat Shrinivas* v. *Armstrong* (4), related to a question of pleading, and throws no light on the present case.

We cannot see what bearing the case of *Ashburner* v. *Keshav Valad Tuku Patil* (5) has upon the case before us.

In the result we are of opinion that the defendant-appellant here was, in doing or ordering the act complained of to be done, acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that under such circumstances the finding of fact that "he did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner he did," is immaterial; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850.

(1) 11 W. R., Cr. 19.
(2) 2 Mad. H. C. Rep., 443.
(3) 3 Bom. H. C. Rep., 36.
(4) 3 Bom. H. C. Rep., 47.
(5) 4 Bom. H. C. Rep., 150.

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However hard it may be upon the plaintiff to have no redress by suit for the grossly irregular and oppressive act of the defendant, it is of the utmost importance to the public and to the State that the protection afforded by Act XVIII of 1850 should not be cut down to meet hard cases, and that Judges, Magistrates and others who have to exercise judicial duties for the benefit of the community should be able to act without the constant fear before them that if they happen to act irregularly or without full legal justification for the act done or ordered to be done by them they will have to answer in damages to the person injured.

In the case of *Fray* v. *Sir Colin Blackburn* (1) Crompton, J., explained the principle upon which the law protected Judges of the Superior Courts in England from actions for a judicial act thus :—

"It is a principle of our law that no action will lie against a Judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which indeed exists for their benefit and was established in order to secure the independence of the Judges and prevent their being harassed by vexatious actions. In the present case there can be no doubt that the action is most improper and vexatious."

That, it appears to us, is the principle which underlies Act XVIII of 1850.

The Executive Government may in gross cases be depended upon by their action to prevent the particular person having an opportunity of again misconducting himself in the discharge of judicial duties.

We allow the appeal, but without costs here or below, and we restore the decree of the Subordinate Judge.

We direct that a copy of this judgment and the record be sent to the Local Government for its consideration.

Appeal allowed.

(1) 3 B. & S., 576.

FULL BENCH.

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February 14.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

BALKARAN RAI AND OTHERS (DEFENDANTS) v. GOBIND NATH TIWARI AND ANOTHER (PLAINTIFFS).

Court-fee—Memorandum of appeal insufficiently stamped—Conditional order admitting appeal—Deficiency made good after period of limitation—Act VII of 1870 *(Court-fees Act), ss.* 4, 5, 6, 9, 10, 11, 12, 28, 30—*"Finality" of taxing officer's decision as to court-fee—Civil Procedure Code, ss.* 54, 541, 582, 638 *—Act XV of* 1877 *(Limitation Act), s.* 4—*Memorandum of appeal from decree granting two distinct declarations—Construction of statute—Practice of Court.*

An appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Limitation Act (XV of 1877) unless it is accompanied by the copies required by the Code.

A memorandum of appeal is a document included in the first and second schedules to the Court-fees Act (VII of 1870), and is a document within the meaning of ss. 4. 25, 28 and 30 of the Act, and therefore cannot be filed or recorded in or received by the High Court unless and until the proper court-fee in respect of it is paid, and is of no validity unless and until it is properly stamped. Consequently, if it is not, when tendered, properly stamped, it is not at that time a memorandum of appeal within the meaning of s. 541 of the Code, and the appeal cannot be regarded as having been at that time presented within the meaning of s. 4 of the Limitation Act, or as valid for any other purpose, except in the events specified in s. 28 of the Court-fees Act.

Where a memorandum of appeal which, when tendered, was insufficiently stamped has subsequently been sufficiently stamped, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation, unless it has been done by order made under the second paragraph of s. 28 of the Court-fees Act. In the case of a High Court, such an order can be made only by a Judge, and by him only in cases of "mistake or inadvertence." These words mean mistake or inadvertence on the part of the Court or its officers, and not on the part of the appellant or his advisers. The expression "head of the office" in s. 28 does not refer to the head of the office of a Court, or at all events to the head of the office of a High Court, acting not as such but as a taxing officer; but it refers to the head of a public office such as the Board of Revenue.

Ss. 9, 10 and 11 of the Court-fees Act are not in conflict with s. 28; nor are ss. 9, 10, 11 and 28, read together, in conflict with s. 54 of the Civil Procedure Code. Cases within s. 10 or s. 11 of the Act would arise only where, through mistake or inadvertence of the Court, a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed, or used in the Court; and clauses *(a)* and *(b)* of

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s. 54 of the Code are similarly related to s. 28 of the Act, and were not intended to cut down or limit its provisions. The "dismissal" of a suit under s. 10 or s. 11 of the Act has the same effect as that provided by s. 56 of the Code in the case of "rejection" of a plaint under s. 54.

Clauses *(a)* and *(b)* of s. 54, which are declared by s. 638 to be inapplicable to the original and civil jurisdiction of the High Court, are also inapplicable to its appellate jurisdiction, notwithstanding the provisions of s. 582.

The word "final" in s. 5 of the Court-fees Act has the same meaning as in s. 12, though it is applied to a different subject. The cases in which it has been held that, notwithstanding the use of this word in s. 12, an appeal lies from a decision as to the category in which the relief sought by a plaintiff or appellant falls, do not mean that decisions which the section declares to be "final" are nevertheless appealable, but that the question of category is not a "question relating to valuation," and therefore is not declared by the section to be final. In both s. 5 and s. 12 "final" is used in its ordinary legal sense of unappealable. A decision under s. 5 of the Act is not open to appeal, revision, or review and is final for all purposes, and no means have been provided or suggested by the Legislature for questioning it.

The officer mentioned in s. 5 of the Court-fees Act is not bound to advise parties as to the stamp required under the Act, or to give them notice that they have not sufficiently stamped documents which the Act requires to be stamped before presentation.

A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in a manner contrary to its plain wording. Nor can the principles of construction to be applied to an Act, be influenced by extraneous considerations, such as questions of hardship.

A plaint contained a prayer for a declaration (i) that certain property was the joint property of the plaintiff, and (ii) that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions and want of title. The decree in the suit, passed on the 14th September 1887, granted both the declarations prayed for. The defendants appealed to the High Court against the whole decree, and stamped their memorandum of appeal with a stamp of Rs. 10 only. On the 9th November 1887 it was tendered to a Judge for admission, and it then bore a report dated the 7th November by the officer appointed under s. 5 of the Court-fees Act, "report will be made on receipt of record." The Judge made an order, "admit, subject to stamp report;" and the memorandum was then received by the office, and the appeal was entered on the register. On the 27th September 1888 the office reported that there was a deficiency in the stamp of Rs. 615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December 1888 it was made good. At the hearing of the appeal a preliminary objection was taken that the appeal had never been validly presented within time, or admitted, and that it could not be heard.

Held that there was before the Court no valid appeal as to the merits of which the Court could give a decision.

Held also that the stamp of Rs. 10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection.

THIS was a reference to the Full Bench by Straight and Mahmood, JJ. The order of reference was as follows :—

STRAIGHT, J.—Upon this appeal being called on, a preliminary objection was taken by Mr. *Hill*, on behalf of the plaintiffs-respondents, to the hearing of the appeal upon the ground that it was barred by limitation. The following dates are material. The suit in the Court below was decided on the 14th September 1887; the appeal was presented for admission on the 9th November 1887 to my brother Brodhurst, bearing upon it an office report, dated 7th November 1887, to the following effect : "Report will be made on receipt of record." On the 9th November 1887 my brother Brodhurst made the following order : "Admit, subject to stamp report." On the 27th September 1888 the stamp report was made, and it was to the effect that Rs. 625 was the proper amount of court-fee payable upon the memorandum of appeal; and that, as only Rs. 10 had been paid upon it, there was a deficiency of Rs. 615. This report of the office was approved by the taxing officer on the 9th November 1888, and on the 19th of the same month the learned pleader for the appellant acknowledged having seen the report, and on the 8th December 1888 the deficiency was made good. Upon these facts the contention of the learned counsel for the respondent is that the presentation for admission on the 9th November 1887 was no presentation in law for the purpose of saving limitation, and that, consequently, the deficiency not having been made good until the 8th December 1888, there was no presentation of a memorandum of appeal bearing the required court-fee within the period of limitation allowed for the presentation of appeals from decrees to this Court. It is also contended by Mr. *Hill* that the failure of an appellant to pay the necessary court-fee through ignorance of what that court-

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fee is, would not constitute good ground for extending the indulgence provided by s. 5 of the Limitation Law. It is also contended by Mr. *Hill* that, as a matter of fact, the present appeal never was admitted, because the order of my brother Brodhurst of the 9th November was a mere conditional order, and that until he or some other Judge of the Court had made an order absolute, admitting the appeal, it never was admitted.

Pandit *Ajudhia Nath*, for the appellant, contends that, though for the mere purposes of court-fee the Registrar's order as taxing officer may be final, yet in considering the question of limitation he is entitled to urge that the court-fee paid upon the memorandum of appeal was the proper court-fee; and that therefore at the time it was presented for admission the memorandum of appeal was a memorandum of appeal properly stamped.

These contentions raise questions of much importance, and it is essential, in the interests not only of litigants and those who have to advise them, but of the Judges who have to deal with these matters, that there should be a clear and distinct expression of the opinion of the Court as to what should be the guiding rule. The first of these points was touched upon in a recent Full Bench ruling, but upon the facts therein disclosed it became unnecessary to decide it. I have consulted the learned Chief Justice and he agrees with my brother Mahmood and myself that these questions should be laid for determination before the Full Bench. We, therefore, refer the above points for determination to the Full Bench.

MAHMOOD, J.—I agree, as I think the points raised require determination by the whole Court, especially with reference to the terms of Rule 19 of the present Rules of Court (1).

(1) "Every memorandum of appeal on the civil side, every memorandum of objection under s. 561 or under s 567 of the Code of Civil Procedure, and every other application on the civil side, which when presented bears upon in at office note that a report as to the sufficiency of the stamp will be made on receipt of the record, shall, as soon as is possible after the receipt of such record, be examined in the office with respect to the sufficiency of the stamp, and the proper officer shall thereupon report as to the sufficiency of the stamp, and cause such memorandum or application, with such report thereon, to be laid before a Judge for orders on the next day upon which a Judge sits for the hearing of applications. No such memorandum or application shall be filed or registered, except in compliance with an order made by a Judge, after he has considered the office report as to the sufficiency of the stamp."

The Hon. *T. Conlan*, the Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Mr. *C. H. Hill*, Mr. *G. T. Spankie*, Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

EDGE, C.J.—Before considering the questions referred to this Full Bench for an expression of our opinion, I shall state as briefly as I can what I now understand to be some of the material facts and dates in this case. It is contended on behalf of some of the persons who were defendants in a suit which was decided by the Subordinate Judge of Gorakhpur adversely to the defendants, that this is a legally admitted appeal from the original decree in that suit, presented according to law and within time by them. On the other hand, it is contended by the plaintiffs in the suit, in whose favour the decree was, that no appeal from the original decree in the suit was legally presented within time or at all, and that what the defendants in the suit say is an appeal, is not in law an appeal which can be heard. For the sake of brevity only I shall call the document which was tendered to this Court as the memorandum of appeal a memorandum of appeal, and I shall refer to the defendants as the appellants and to the plaintiffs as the respondents.

The decree below was made on the 14th September 1887. The document which it is contended on behalf of the appellants is in law a memorandum of appeal from that decree, was tendered to my brother Brodhurst for admission on the 9th November 1887. It then bore a stamp of the value of Rs. 10 only. When it was tendered to my brother Brodhurst it bore upon it a report by Dip Chand, who was then the officer whose duty it was, within the meaning of s. 5 of the Court-fees Act, 1870, to see that a fee was paid under chapter ii of that Act. That report had been made on the 7th November 1887, and was, so far as is material, as follows:—"Report will be made on the receipt of record."

On the 9th November 1887, my brother Brodhurst endorsed on the document an order in the following words:—"Admit, subject to stamp report."

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That is a form of order which in such cases I have been in the habit of making, and which I have always understood to be a conditional order of admission, conditional in the sense that if the stamp report when made showed that the stamp on the memorandum of appeal was sufficient, the appeal was thereupon admitted; but that if it showed that the stamp was insufficient, my order did not operate as an order of admission.

After my brother Brodhurst had made his order and on the same day, that is, on the 9th November 1887, the memorandum of appeal was received by the office and the appeal was entered in the register of first appeals. On the 27th September 1888, Dip Chand made his stamp report. That report was to the effect that Rs. 625 was the proper amount of court-fee payable upon the memorandum of appeal; and that, as only Rs. 10 had been paid upon it, there was a deficiency of Rs. 615.

As Dip Chand is absent on sick leave, and as the then taxing officer is no longer an officer of the Court, having been promoted, it is impossible to ascertain when first that report of Dip Chand of the 27th September 1888 came to the notice of the appellants or of their vakíl.

On or prior to the 2th November 1888, the question of the correctness of the report of Díp Chand came before the then taxing officer, as I find that on the 9th November 1888 he made in the matter an order in writing in the following terms :—"See order in connected case. Deficiency must be made good."

The order in the connected case was as follows :—"The decree gives consequential relief, and deficiency must be made good."

Immediately below that order of the then taxing officer, Munshi *Kashi Prasad*, the vakíl who was acting for the appellants, wrote on the 19th November 1888, "Seen," showing that on that day he had seen the decision of the then taxing officer. That decision of the taxing officer of the 9th November 1888 was accepted on behalf of the appellants as final and conclusive, for on the 8th December 1888 the appellants delivered to the officer of this Court stamps equivalent to the amount of the deficiency which

Dip Chand had reported to exist. With the exception of the order of my brother Brodhurst of the 9th November 1887, no order relating to the admission of the appeal was ever made by any Judge of the Court or indeed by any one, nor was the memorandum of appeal ever tendered to any Judge or indeed to any one for admission, except on the occasion when it was tendered to my brother Brodhurst on the 9th November 1887. Memoranda of appeal are not, nor were they, admissible in the Court, except under an order of a Judge.

It has been the practice of this Court to allow time, irrespective of any question of limitation and of the circumstances under which a memorandum of appeal is tendered when insufficiently stamped, to an appellant to make good any deficiency which may be reported to exist in the stamp of a memorandum of appeal, in cases in which the stamp report is accepted as correct by the appellant, and also in cases in which the taxing officer or the Judge appointed for that purpose under s. 5 of the Court-fees Act has decided that the stamp is insufficient. One of the questions involved in this case is whether that practice is in compliance with or in contravention of the law. If it is in contravention of law, the practice was unlawful.

A practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful; nor can a practice of a Court justify a Court in putting upon an Act of the Legislature a construction which is contrary to the plain wording of the Act. If it were otherwise, cases might occur in which an absolutely different construction, based upon practice only, might be placed by this Court, the High Court at Calcutta, the High Court at Madras, the High Court at Bombay and the Chief Court of the Panjáb upon a general Act, applicable to the whole of British India, which was susceptible of one construction only. Such a principle of construction in such a case would lead, not to making the law certain, but to confusion and uncertainty.

In order to clear the ground and to keep my mind in the consideration of the important legal questions which arise in this

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case free from extraneous influences, I shall first refer to the *argumentum ad misericordiam*, the plea of hardship, which Mr. *Kashi Prasad* pressed upon us, and which at one time very nearly induced me to overlook what I conceive to the true principles of law which can alone guide us to a safe and legal conclusion. I shall then consider how an appeal can be presented to this Court; what the law requires for the valid presentation of an appeal; whether those requirements have been complied with in this case; and various other points which arose during the arguments, although many of the latter appear to my mind to be irrelevant.

In the course of the argument Mr. *Kashi Prasad* pressed upon us the hardship which would result to his clients, the defendants in the suit, if we were to hold that this appeal had not been presented within time. He also contended that in that event that hardship would be the direct result of the omission of the officer of this Court, Dip Chand, whose duty it was to see that fees are paid under chapter ii of the Court-fees Act, to inform him, Mr. *Kashi Prasad*, or his clients, before the ninety days allowed by article 156 of the second schedule of the Indian Limitation Act, 1877, had expired, that the stamp upon the memorandum of appeal was insufficient.

In my opinion it was no part of the duty of Dip Chand to advise parties as to the stamp required under the Court-fees Act, or to give them notice that they had not sufficiently stamped documents which that Act requires to be sufficiently stamped before they are presented to the Court.

If it were the duty of the officer who has to see that the proper fees are paid, to inform parties or their vakíls that the stamps upon which their memoranda of appeal or other papers were tendered to the Court were insufficient, he would require a staff of assistants, which he has not got, and questions of limitation would depend, not upon the law as applied to the acts of the parties or their vakíls, but upon our officer doing such duty and his being able to prove that his notice of a deficiency in the stamp had reached either the parties themselves or, if they had vakíls, their vakíls, within time to allow of the deficiency in the stamp being made good within the period

of limitation allowed by law. This in many cases it would be practically impossible for our officer to do, on account of the number of parties, the distance of their homes in most cases from Allahabad, or, where a vakíl was engaged in the case, his absence from Allahabad, and the practical impossibility of getting from native litigants acknowledgments that they had received such notices.

Further, a very large percentage of memoranda of appeal is tendered so late that even if our officer was able to ascertain on the day, or the day following that, on which a memorandum of appeal was tendered, that the stamp was insufficient, the notice could not reach the parties, or their vakíl if they had one, in time to allow of the deficiency in the stamp being made good if such deficiency had to be made good within the period of limitation. It is, in my opinion, the duty of those who tender documents to this Court to see that such documents bear at the time when they are tendered the proper stamps required by the Court-fees Act, and if they neglect that duty either intentionally, as I fear too frequently happens, or through carelessness or ignorance, they or their advisers, and not the officers of this Court, are the parties upon whom the blame for the results of such neglect must fall.

We cannot allow any question of hardship to influence us in applying the principles of construction to Acts of the Legislature where the wording of those Acts is plain and unambiguous. We are not responsible for those Acts, and to put upon those Acts a construction different from that which, according to the principles of construction, upon which a Court of justice must act, they bear, would be to depart from our duty as Judges and to arrogate to ourselves the powers and functions of the Legislature. We have to construe the Acts of the Legislature as we find them, whether we approve of them or not,—not to alter or amend them. We have no power to read into the second schedule of the Indian Limitation Act an article which is not there, any more than we have power to read into the Indian Limitation Act or the Court-fees Act or any other Act or Code, a section or words which it does not contain. So far as I am aware, even their Lordships of the Privy Council

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have no such powers. We have to justify our decisions when they are based on or governed by the Indian Codes, not by extraneous considerations, such as that of hardship, but by distinct reference to the section or article of the Code upon the proper construction of which our decision depends. This is a duty which it is most necessary for us carefully to attend to if we are to avoid causing doubt, perplexity and uncertainty, as to the law in the Courts which are bound to accept our decisions as their guide.

The question as to whether this appeal was presented within time depends, in my opinion, upon the construction of s. 541 of the Code of Civil Procedure, of ss. 4, 5, 25, 28 and 30 of the Court-fees Act (VII of 1870), of s. 4 of the Indian Limitation Act, 1877, and of article 156 of the second schedule of the last mentioned Act. It will be necessary to refer to some other sections in order to see how far, if at all, many arguments which were addressed to us by way of analogy were well founded.

Under s. 541 of the Code of Civil Procedure, an appeal from an original decree must be made in the form of a memorandum in writing presented by the appellant, and must be accompanied by a copy of the decree appealed against, and (unless the appellate Court dispenses therewith) of the judgment on which it is founded. Such memorandum must set forth concisely and under distinct heads the grounds of objection to the decree appealed against.

S. 548 of the Code of Civil Procedure enacts that "when a memorandum of appeal is admitted, the appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for that purpose. Such book shall be called the Register of Appeals," and shows that the memorandum of appeal must be in fact first admitted as a condition precedent to its being endorsed with the date of presentation and to the appeal being entered in the register.

It has been held by the Chief Court of the Panjáb, and I think rightly, that an appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Indian Limitation Act,

1877, unless it be accompanied by the copies prescribed by the Code of Civil Procedure: *Bhag Singh* v. *Jhandu Singh* (1) and *Nihal Singh* v. *Johar Singh* (2).

The Court-fees Act, 1870, was, as even its name imports, an Act primarily passed for the purpose of prescribing the fees which are to be paid in respect of documents to be used in Courts. It also provides in the schedules for the stamps to be used in certain offices other than offices of Courts of justice.

That Act not only prescribes the fees, but provides how those fees are to be ascertained, how questions as to the sufficiency of fees on documents, so far as Courts are concerned, are to be determined, and the conditions under which only the documents included in the first and second schedules to the Act may be received, filed, registered or used, as the case may be, in Courts in India. The Court-fees Act also specifies the documents which need not be stamped under that Act for the purpose of being used in Courts. A memorandum of appeal is a document specified in the first and also in the second schedule to the Court-fees Act, 1870, within the meaning of s. 4 of that Act, and is a document which, under s. 25 of that Act, must be stamped with a stamp at least equivalent to the fee chargeable in respect of it under the Act. A memorandum of appeal is consequently a document which ought to bear a stamp under the Court-fees Act, 1870, within the meaning of s. 28 of that Act. It is also a document requiring a stamp within the meaning of s. 30 of the Court-fees Act, 1870.

It follows that in construing ss. 4, 28 and 30 of the Court-fees Act, when the question arises as to a memorandum of appeal, we must read into those sections the words "Memorandum of appeal."

Thus read for the purposes of construction, s. 4 so far as memoranda of appeals are concerned reads as follows:—"No memorandum of appeal of the kind specified in the first or second schedule to this Act annexed as chargeable with a fee shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise

(1) Panj. Record No. 7 of 1879. (2) Panj. Record No. 147 of 1879.

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of its jurisdiction as regards appeals from the Courts subject to its superintendence, unless in respect of such memorandum of appeal there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such memorandum of appeal."

Similarly, s. 28 reads thus :—"No memorandum of appeal which ought to bear a stamp under the Act shall be of any validity unless and until it is properly stamped. But if any such memorandum of appeal is through mistake or inadvertence received, filed or used in Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if the thinks fit, order that such memorandum of appeal being stamped accordingly, the same or any proceeding relative thereto, shall be as valid as if it had been properly stamped in the first instance."

Similarly, the first paragraph of s. 30 reads thus :—"No memorandum of appeal requiring a stamp under the Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled." The stamp referred to in s. 30 must mean a sufficient stamp according to the Act.

We have then s. 4 enacting that no memorandum of appeal, such as that in the present case, shall be filed or recorded in, or received by, any High Court, such as this High Court, unless at least the proper fee in respect of it be paid. We have also s. 28 enacting that no such memorandum of appeal as this shall be of any validity unless and until it is properly stamped.

The second paragraph of s. 28 is of importance in more ways than one, as it emphasizes the provision contained in the first paragraph of that section by providing that in the events therein specified a memorandum of appeal and all the proceedings relative thereto "shall be as valid as if it had been properly stamped in the first instance," and making it obvious that the intention of the Legislature was that an improperly stamped memorandum of appeal chargeable with a fee under the Act should be treated as an absolutely invalid memorandum of appeal which could not, until it was

properly stamped in the events specified in the second paragraph of that section, be the foundation of any valid legal proceeding in any Court. The second paragraph of s. 28 prevents us applying the principle of *nunc pro tunc* except when an order under that paragraph has been made and complied with.

It has been contended that, although this Court could not legally file, record, receive or act upon the document in question, assuming that it was not properly stamped when tendered, and is bound to treat it as of no validity, yet that this Court must treat it as a document which was on the day on which it was tendered to this Court a memorandum of appeal within the meaning of s. 541 of the Code of Civil Procedure, and regard the appeal as having been presented within the meaning of s. 4 of the Indian Limitation Act to this Court on that day. To do so would, it appears to me, be to treat the document in question as a valid memorandum of appeal for the most important purpose for which a valid memorandum of appeal is required, namely, as the inception or foundation of a valid appeal.

When the Legislature has enacted that a memorandum of appeal which is not properly stamped shall not be treated as of any validity and shall not be filed or recorded in or received by this Court and shall not be acted upon in any proceeding in this Court, I as a Judge of this Court, who have to obey the mandates of the Legislature and have not power to legislate, can only regard and deal with an improperly stamped memorandum of appeal as the Legislature has said that it must be regarded and dealt with.

Further, as a Judge who is bound by the statute law as I find it, I cannot hold that any practice of this Court which not only is not known to, but has not been sanctioned by, the Legislature, entitles me to treat for any purpose as valid a document which the Legislature has enacted shall not be "of any validity." To do so in this case would be to treat a memorandum of appeal as a document which was not specified in either of the schedules to the Court-fees Act.

I fail to understand how an invalid memorandum of appeal, which in law must be regarded as no memorandum of appeal at all,

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can, except in the events specified in the second paragraph of s. 28 of the Court-fees Act, be treated as a valid memorandum of appeal, or how the tendering to this Court of a memorandum of appeal which was of no validity, can be regarded as the presentation of an appeal for the purposes of the Indian Limitation Act, 1877, or for any other purpose.

In my opinion an appeal cannot be said to be presented within the meaning of s. 4 of the Indian Limitation Act, 1877, when the only presentation of the appeal is the tendering to the Court of a document which the Legislature has specifically enacted shall not be regarded by a Court as of any validity, and that the tendering to my brother Brodhurst on the 9th November 1887 of a document which the law says shall be regarded as of no validity was no more a presentation of an appeal than would the tendering to him of a blank piece of paper have been a presentation of an appeal. In one case he could see nothing on the paper; in the other case the law had forbidden him to see anything on it.

It has been contended that, inasmuch as this document is now sufficiently stamped, we may apply the principle of *nunc pro tunc* and treat it as if it had been properly stamped in the first instance, that is, at the time when it was tendered to this Court, and my brother Brodhurst made his order of the 9th November 1887, and give effect to it as if it was, when tendered on the 9th November 1887, a valid memorandum of appeal. That I cannot do without doing violence to the plain wording of s. 28 of the Court-fees Act. Although the proper stamps have since been put upon the memorandum of appeal, that was not done under any order of any Judge of this Court. Indeed, no application was ever made to any Judge of this Court or to any one else to make any such order. So far as this Court is concerned, no one but a Judge of this Court could make such an order under s. 28 of the Court-fees Act, nor could any Judge of this Court make any such order unless the memorandum of appeal had through mistake or inadvertence been received, filed or used in this Court or its office without being properly stamped. The words "mistake or inadvertence" limit the cases in which a

Judge of this Court can make an order under s. 28 of the Court-fees Act, 1870.

The "mistake or inadvertence" in s. 28 must mean mistake or inadvertence on the part of the Court or its officers, and not mistake or inadvertence on the part of an appellant or his advisers, who do not act for the Court in the receiving or filing or using of a memorandum of appeal in the Court. If the "mistake or inadvertence" is to be read as the mistake or inadvertence of the party, it would in the great majority of cases be impossible for a Judge to ascertain whether the receiving, filing or using of an improperly stamped document was owing to the mistake or inadvertence of the party or to his intentional act in an attempt to escape having to pay the proper fee at the proper time or at all.

For the contention that as sufficient stamps in value have since the document was tendered been affixed to it, although not under an order under s. 28 of the Court-fees Act, it is to be treated as if it was when tendered on the 9th November 1887 a valid memorandum of appeal for the purpose of limitation, and that we are to hold that the appeal was on that day presented within the meaning of s. 4 of the Indian Limitation Act, 1877, Mr. *Kashi Prasad*, for the appellants, relied upon the following cases:—*Ram Lal* v. *Harrison* (1); *Sheo Partab Narain Singh* v. *Sheo Gholam Singh* (2); *Syed Ambur Ali* v. *Kali Chand Dass* (3); *Musammat Begee Begum* v. *Syed Yusuf Ali* (4) and *Musammat Chouwara* v. *Wasil Khan* (5), but mainly upon *Skinner* v. *Orde* (6) in the Privy Council. As the case of *Skinner* v. *Orde* (6) was a case decided by their Lordships of the Privy Council and as we were mainly pressed with it by Mr. *Kashi Prasad*, I shall consider it first to see how far, if at all, it bears upon the present contention. It is to be observed that the petition to sue as a pauper in that case was when presented properly stamped, in accordance with law, with an eight anna stamp, and was consequently a document which the Court was not prohibited from receiving by the Court-fees Act, 1870. In *Skinner* v.

(1) I. L. R., 2 All., 832.
(2) I. L. R., 2 All., 875.
(3) 24 W. R., 258.
(4) N.-W. P. H. C. Rep., 1874, p. 139.
(5) S. D. A., N.-W. P., 1864, p. 18.
(6) L. R., 6 I. A., 126; I. L. R., 2 All., 241.

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Orde (1) their Lordships of the Privy Council held that on the full stamp for a plaint having been paid, that document, which had been properly received as a petition to sue as a pauper, might be treated as the plaint in a suit by a person no longer a pauper. In that case their Lordships said :—"To be logical, the Court should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

"The case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by s. 308 than that contemplated by s. 310. There are no negative words in the Act (the then Code of Civil Procedure) requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed."

I infer from the passage which I have just quoted that if there had been any negative words in the Act requiring the rejection of the plaint or anything in its enactments requiring their Lordships to say that the petition should not, when the money had been paid for the fees, be considered as a plaint, from the date when it was filed, their Lordships would have given effect to them, and not, as it is contended here that we should treat such words or provisions as a nullity. In this case we have not only the specifically negative words of s. 4 of the Court-fees Act and the specifically negative words of s. 28 of that Act, but the specific enactment in

(1) L. R., 6 I. A., 126; I. L. R., 2 All., 241.

the second paragraph of s. 28 under which alone a memorandum of appeal which was not properly stamped in the first instance can retrospectively be given effect to as valid as if it had been properly stamped in the first instance.

When in the passage which I have quoted their Lordships alluded to the practice in the Indian Courts, I must assume that their Lordships were alluding to a lawful practice of the Indian Courts, such as was authorized, for example, by the second paragraph of s. 28 of the Court-fees Act or by s. 6 of the repealed Act, XV of 1868, and not to a practice if such existed, which was contrary to the express enactment of the Legislature, a practice which unquestionably their Lordships, if their attention had been drawn to it, would not have endorsed, as appears from what their Lordships said in the subsequent portion of the passage which I have quoted. So far as the case of *Skinner* v. *Orde* (1) is applicable, it is, in my opinion, an authority against Mr. *Kashi Prasad's* contention, as it indicates that effect must be given to negative words and words of prohibition when they occur in Acts of the Legislature.

As to the case of *Ram Lal* v. *Harrison* (2), I should have considered that the amendment there was such as not to affect the date of the original institution of the suit. That case throws no light upon this case.

In the case of *Sheo Partab Narain Singh* v. *Sheo Gholam Singh* (3) it does not appear whether or not the attention of the learned Judges was called to s. 28 of the Court-fees Act, nor does it appear under what circumstances the insufficiently stamped memorandum of appeal had been filed. It appears, however, that the Judge who returned the memorandum of appeal, it is said under s. 54 *(b)* of Act X of 1877, omitted to comply with that section and to fix a time. Possibly the Judge may not have considered that he was returning the memorandum of appeal under s. 54 *(b)* of that Code.

In the case of *Syed Ambur Ali* v. *Kali Chand Dass* (4) the learned Judges do not refer to s. 4 or to s. 28 of the Court-fees Act,

(1) L. R., 6 I. A., 126; I. L. R., 2 All., 241.
(2) I. L. R., 2 All., 832.
(3) I. L. R., 2 All. 875.
(4) 24 W. R. 258.

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1870, nor does it appear whether or not their attention had been called to those sections. They based their judgment mainly on s. 31 of Act VIII of 1859.

In the case of *Musammat Begee Begam* v. *Syed Yusuf Ali* (1) the learned Judges did not consider what effect, if any, the Court-fees Act, 1870, had upon their construction of the Limitation Act, IX of 1871. In that case no time had been fixed by the Court within which the plaintiff should make good the deficiency.

The case of *Musammat Chowara* v. *Wasil Khan* (2) was decided long before the Court-fees Act, 1870, was passed.

I cannot treat cases in which the Court-fees Act of 1870 was not relevant, or where relevant it was not even referred to, as authorities which it is safe to follow in this case, on the question which I am now considering.

Notwithstanding the cases to which I have just referred, I am, as I have already said, of opinion that the law prohibited the Court from receiving, filing or using the memorandum of appeal in this case, in the condition in which it was when it was tendered on the 9th November 1887, and that as no order has been made by a Judge under s. 28 of the Court-fees Act, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation. If we are to regard the time when the document was fully stamped as the time when it was presented, the presentation was beyond the limit of ninety days allowed by article 156 of the second schedule of the Indian Limitation Act.

It has also been contended that ss. 9, 10 and 11 of the Court-fees. Act are in conflict with s. 28 of that Act, and that ss. 9, 10, 11 and 28 of the Court-fees Act are in conflict with s. 54 of the Code of Civil Procedure, and, further, that so far as the High Court is concerned, s. 28 of that Act is in conflict with s. 54 of the Code of Civil Procedure, and on that assumption it has been argued that we should not in this case construe s. 28 of the Court-fees Act according to its plain wording.

(1) N.-W. P. H. C. Rep., 1874, p. 139. (2) S. D. A., N.-W. P., 1864, p. 18.

First, as to the contention that ss. 9, 10 and 11 of the Court-fees Act are in conflict with s. 28 of that Act. On a careful consideration of those sections I fail to see any conflict between them.

Chapter iii of the Court-fees Act, in which are ss. 9, 10 and 11, relates to public offices and to Courts other than High Courts or Courts of Small Causes in the Presidency Towns. In the Courts to which Chapter iii relates it is the Court, that is, the Judge of the Court, whose duty it is under s. 12 to decide questions as to valuation for the purposes of determining the amount of court-fees chargeable. In such Courts the question as to the sufficiency of the stamp on a plaint, when raised, is, as a rule, dealt with as one of the issues in the suit. I assume that the reason for such questions not being sooner disposed of in such Courts is that in those Courts a plaint is presented in nearly all cases to the officer appointed in that behalf by the Court, under s. 48 of the Code of Civil Procedure, and not to the Judge or Munsif. Ss. 9, 10 and 11 of the Court-fees Act relate to suits, and do not relate to appeals. That appears on an examination of those sections, and also from the fact that s. 12 enacts that every question relating to valuation for the purposes of determining the amount of any fee chargeable under Chapter iii on a plaint shall be decided by the Court in which such plaint is filed, and further enacts that every question relating to valuation for the purposes of determining the amount of any fee chargeable under Chapter iii on a memorandum of appeal, shall be decided by the Court in which the memorandum of appeal is filed, and in each case such decision shall be final as between the parties to the suit. When such a decision with regard to the memorandum of appeal shows that an additional fee is required, s. 28 of the Court-fees Act would at once apply.

The application of s. 28 would not be inconsistent with the provisions of s. 10 or s. 11. Cases coming within s. 10 or s. 11 of the Court-fees Act would arise only where through mistake or inadvertence of the Court a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed or used in the Court. No such Court would knowingly receive, file or use

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a plaint which was insufficiently stamped, in contravention of the express prohibition of s. 6 of the Court-fees Act.

S. 9 merely empowers the Court to issue a commission for the purposes therein mentioned.

There is consequently, in my opinion, no conflict between ss. 9, 10 or 11 and s. 28 of the Court-fees Act. Now, as to the contention that there is a conflict between ss. 9, 10, 11 and 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure. The latter portion only of clause I and clause II of s. 10 and possibly s. 11 of the Court-fees Act deal with the same subject as s. 54 of the Code of Civil Procedure, and then only with the subject dealt with in clause *(a)* of s. 54.

The only apparent conflict—the conflict is apparent and not real—between ss. 10 and 11 of the Court-fees Act and s. 54 of the Code of Civil Procedure consists in this, that whereas ss. 10 and 11 of the Court-fees Act enact that in the event of the additional fee not being paid within such time as the Court shall fix, the suit shall be "dismissed," s. 54 of the Code of Civil Procedure enacts [clause *(a)*] that if the relief sought is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so, the plaint shall be rejected. The dismissal of a suit under s. 10 or s. 11 of the Court-fees Act would not be a dismissal on the merits, and consequently would not preclude a plaintiff from presenting a fresh plaint in respect of the same cause of action, and such fresh plaint could be presented accordingly, assuming that it could be presented within the time within which under the Indian Limitation Act it could be presented, and that is all that is provided by s. 56 of the Code of Civil Procedure in the case of the rejection of the plaint. There is consequently, in my opinion, no conflict between ss. 9, 10 and 11 of the Court-fees Act, taken by themselves, and s. 54 of the Code of Civil Procedure.

If ss. 9, 10 and 11 of the Court-fees Act are read, as I think they must be, in conjunction with s. 28 of that Act, is there a con-

flict between them, so read, and s. 54 of the Code of Civil Procedure; or between s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure? I have already pointed out how far, in my opinion, s. 54 of the Code of Civil Procedure applies to the matters which are dealt with by ss. 9, 10 and 11 of the Court-fees Act. However, s. 28 of the Court-fees Act is one of wider application than are ss. 10 and 11 of that Act, and would in Courts other than the High Court apply to cases coming within clauses (*a*) and (*b*) of s. 54 of the Code of Civil Procedure. Later on I propose to show that, at least in my opinion, clauses (*a*) and (*b*) of s. 54 do not apply to the High Courts in the exercise of their ordinary original civil, extraordinary original civil, or appellate jurisdiction; and if I am right in that view, the question now under consideration is only interesting from the point of view of analogy.

In enacting in ss. 10 and 11 of the Court-fees Act that "if the additional fee is not paid *within such time as the Court shall fix*, the suit shall be dismissed," the Legislature could not have intended to cut down or limit the specific provisions of s. 28 of the same Act.

The wording of s. 54, clauses (*a*) and (*b*) of the Code of Civil Procedure, is in this respect almost precisely similar to that in the sentence which I have above quoted from ss. 10 and 11 of the Court-fees Act. It is "the plaint shall be rejected in the following cases:—

"(*a*) If the relief sought is undervalued, *and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:*

"*(b)* If the relief sought is properly valued, but the plaint is written on paper insufficiently stamped, *and the plaintiff on being required by the Court to supply the requisite stamp within a time to be fixed by the Court, fails to do so:—*"

If the Legislature did not intend by the use of the words which I have quoted from ss. 10 and 11 of the Court-fees Act to cut down or limit the specific provisions of s. 28 of that Act, I see no reason why we should infer from the use by the Legislature of

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almost precisely similar words in s. 54 of the Code of Civil Procedure that the Legislature intended by s. 54 to cut down or limit the specific provisions of s. 28 of the Court-fees Act or its application. If there was any such intention I should expect to find it clearly expressed.

Further, I fail to see any case in which there could be a conflict between the provisions of s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure; unless a Court wilfully acted in contravention of s. 4 or s. 6 of the Court-fees Act, and this it is not to be presumed that a Court would do.

As I have already indicated, the effect of ss. 4, 6 and 28 of the Court-fees Act is, in my opinion, to prohibit a Court from knowingly filing, recording or receiving an improperly stamped document of the classes specified in the first or second schedule to the Court-fees Act, and the object of the second paragraph of s. 28 is to enable the Court or the Judge when such an improperly stamped document has through mistake or inadvertence been received, filed or used in the Court, to make an order under which such document may be properly stamped, and on being so stamped to give effect to it as a document as valid as if had been properly stamped in the first instance.

For the reasons which I have above stated I see no conflict between ss. 9, 10, 11 and 28 of the Court-fees Act or any of them and s. 54 of the Code of Civil Procedure, and for these reasons and a further reason, to which I shall presently refer, I am satisfied that no conflict exists or can arise, so far as the High Court is concerned, between s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure. Even if there was a conflict between ss. 9, 10 and 11 of the Court-fees Act and s. 54 of the Code of Civil Procedure it would, it appears to me, be immaterial so far as the question before us in the case is concerned. Ss. 9, 10 and 11 of the Court-fees Act do not relate to appeals, and s. 638 of the Code of Civil Procedure enacts that clauses (*a*) and (*b*) of s. 54 shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. Most probably the reason why s. 638 enacts that

clauses (*a*) and (*b*) of s. 54 shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction is, that in a High Court questions in difference as to whether a fee is payable under Chapter ii of the Court-fees Act and the amount of the fee, if any, in cases within its extraordinary original civil jurisdiction and in such cases within its ordinary original civil jurisdiction as s. 3 of that Act provides for, are by s. 5 for the taxing officer, the Chief Justice, or the Judge appointed for that purpose by the Chief Justice, and not for the Court. As to other cases within the ordinary original civil jurisdiction of a High Court, the procedure is, so far as I can see, left to be settled by rules to be made by the High Court.

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The further reason for my opinion that no conflict between s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure, so far as the High Court is concerned, exists or can arise, is this. Such a conflict could not in any case arise, so far as the High Court is concerned, unless clauses (*a*) and (*b*), or one of them, of s. 54 of the Code of Civil Procedure apply to the High Court in the exercise of its ordinary original civil, extraordinary original civil or appellate jurisdiction.

As I have pointed out, it is by s. 638 of the Code of Civil Procedure enacted that clauses (*a*) and (*b*) of s. 54 shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. It has, however, been contended that s. 582 of the Code of Civil Procedure makes clauses (*a*) and (*b*) of s. 54 applicable to the High Court in the exercise of its appellate jurisdiction.

I cannot so read the first part of s. 582 and apply to the High Court in its appellate jurisdiction clauses (*a*) and (*b*) of s. 54, which s. 638 enacts shall not apply to it in the exercise of its ordinary or extraordinary original civil jurisdiction. If I am correct in my surmise as to the reason why by s. 638 it was enacted that clauses (*a*) and (*b*) of s. 54 should not apply to the High Court in the exercise of its extraordinary original civil jurisdiction, the same reason would apply to the exclusion of the application of those clauses to the High

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Court in the exercise of its appellate jurisdiction, as questions in difference as to whether a fee is payable under Chapter ii of the Court-Fees Act, and the amount of the fee, if any, in cases within its appellate jurisdiction, are, under s. 5 of that Act, for the taxing officer, the Chief Justice or the Judge appointed for that purpose and not for the Court. The latter portion of s. 582 of the Code of Civil Procedure strengthens this view. If the earlier portion of s. 582 was intended to have the wide application which it is contended that it has, I do not understand why it was considered necessary in the latter portion of that section to enact that "and in Chapter XVI, so far as may be, the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant, the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal in proceedings arising out of the death, marriage or insolvency of parties to an appeal." In my opinion clauses (*a*) and (*b*) of s. 54 of the Code of Civil Procedure do not apply to the High Court in the exercise of its appellate jurisdiction.

Another contention was that the term "final" in s. 5 of the Court-fees Act does not mean final as that term is understood in law, and that the decision of the taxing officer, the Chief Justice or the Judge appointed under s. 5 is open to appeal or revision. The arguments were that "final" in s. 5 has the same meaning as "final" in s. 12, and that decisions of the Court under s. 12 had been held to be appealable, and therefore not final as that term is generally understood. Further, that a decision under s. 12 of the Court-fees Act was in the same position as an order under s. 54 of the Code of Civil Procedure, that an order under s. 54 was appealable, and that consequently decisions under s. 5 or s. 12 of the Court-fees Act are appealable.

I have no doubt that the term "final" in s. 5 of the Court-fees Act has precisely the same meaning as the term "final" in s. 12 of that Act. But the subject to which that term is applied in s. 5 is different from that to which it is applied in s. 12. In s. 5 it is applied to a decision as "to the necessity of paying a fee or the amount thereof," whereas in s. 12 it is applied to a decision as "to

"every question relating to valuation for the purpose of determining the amount of any fee chargeable under the chapter (chapter iii) on a plaint or memorandum of appeal." When we come to look into the authorities it will be necessary to keep this distinction in mind.

For the proposition that a decision under s. 12 of the Court-fees Act is appealable, the following authorities were relied upon, that is to say, *Chunia* v. *Ram Dial* (1), *Gulzari Mal* v. *Jadaun Rai* (2), *Chedi Lal* v. *Kirath Chand* (3), and *Muhammad Sadik* v. *Muhammad Jan* (4).

The contention that these authorities, with the exception of that in the I. L. R., 11 All., 91, show that decisions within the meaning of s. 12 of the Court-fees Act, 1870, are appealable, arose from confusing the decisions to which the term "final" in that section applies with decisions as to subject-matter to which, according to those authorities, the term "final" does not in s. 12 apply.

What those authorities, rightly or wrongly, it is immaterial to consider which, decided was that a question as to the category of the relief sought in a plaint or by a memorandum of appeal is not "a question relating to a valuation for the purpose of determining the amount of any fee chargeable" under Chapter iii of the Court-fees Act on a plaint or memorandum of appeal, and consequently that an appeal lay from a decision as to the fundamental question of category.

It could not, in my opinion, be contended that category is not under s. 5 of the Court-fees Act for the taxing officer; otherwise he could not decide whether any fee was payable or the amount thereof.

To explain what I mean by the term "category" I give an example. If a Court under s. 12 applied to a case in which the only relief asked was a declaration that the plaintiff was the adopted son of A. B., the scale of fees applicable to a case in which the relief asked was a decree for possession of immoveable property, that would be an error as to the category of the relief asked for, and

(1) I. L. R., 8 All., 360.
(2) I. L. R., 2 All., 63.
(3) I. L. R., 2 All., 682.
(4) I. L. R., 11 All., 91.

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that question might, according to those authorities, be the subject of an appeal. No Court, so far as I am aware, except this Court in the case reported at I. L. R., 11 All., 91, has held that the term "final" in s. 12 of the Court-fees Act is not to have applied to it the ordinary legal meaning of "final." What they have held is that the question of category is not a question relating to valuation for the purpose of determining the amount of a fee under s. 12, and consequently that s. 12 does not enact that a decision as to category shall be final.

I confess that when I joined in the judgment in *Muhammad Sadik* v. *Muhammad Jan* (1), I did not quite understand, as I do now, the distinction which the Courts had drawn between a question of category and a question relating to valuation for the purpose of determining the amount of a fee chargeable within the meaning of s. 12 of the Court-fees Act. That decision went beyond what had been decided by all the previous authorities, and so far as it decided that an appeal lay from a decision which was a decision within the meaning of s. 12 of the Court-fees Act, it was not only not supported by authority, but was against the authorities, and I am now satisfied that to that extent it was an erroneous decision in law.

Whether the distinction which has been drawn is a sound one or not, it is obvious that the Courts in their efforts to differentiate the two questions, considered that unless they could be differentiated, a decision of a Court under s. 12 on a question of category would be final and could not be questioned as between the parties.

Another argument in support of the contention that "final" does not mean final was that, inasmuch as an order of rejection under s. 54 of the Code of Civil Procedure rejecting an appeal is a "decree," every such order in virtue of s. 540 or s. 584, as the case may be, appealable is a decree, and that similarly a decision under s. 12 or s. 5 of the Court-Fees Act is appealable. It appears to me that that argument is based upon a confusion of reasoning. I would not have thought it necessary to observe, if it had not been contended to the contrary, that s. 2 of the Code of Civil Procedure,

(1) I. L. R., 11 All., 91.

which merely defines what is a decree, does not confer any right of appeal.

S. 540 relates to appeals from original decrees and s. 584 to appeals from appellate decrees, but, so far as this question is concerned, the wording of the two sections is the same. I shall take s. 540 to test the accuracy of the contention. That section is as follows :—

"Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. An appeal may lie under this section from an original decree passed *ex parte*.

That section does not confer a right of appeal from all adjudications or orders which are decrees as defined in s. 2 of the Code of Civil Procedure. It only confers the right of appeal in cases in which the right of appeal is not expressly taken away by the Code of Civil Procedure "or by any other law for the time being in force."

It cannot be doubted that ss. 5 and 12 of the Court-Fees Act are in force, nor can it be doubted that by those sections it is respectively expressly enacted that the decisions in those sections respectively referred to shall be and are "final." A decision, decree or order could not be described as "final" if it was appealable or so long as it was appealable, and I must assume that the Legislature in using the term "final" in ss. 5 and 12 used it in the legal sense in which that term is always used in Acts and Codes.

So far therefore, if at all, as s. 54 of the Code of Civil Procedure applies to decisions under s. 5 or s. 12 of the Court-Fees Act, the orders under it come within the exceptions contained in ss. 540 and 584 of the Code of Civil Procedure.

To take an example of what the Legislature means when it uses the term "final" I refer to s. 588 of the Code of Civil Procedure, which enacts that the "orders passed in appeal under this

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section shall be final." It has never been contended that "final" did not mean in that section what is understood by the term final, and that such orders were appealable.

Where the Legislature has used the term "final" for other purposes and without intending that the decision, decree or order to which it is applied shall not be appealable, it has been careful to express its intention, of which explanation IV in s. 13 of the Code of Civil Procedure is an example.

Further, it is clear to my mind that a decision under s. 5 of the Court-fees Act "as to the necessity of paying a fee or the amount thereof" is not a decree as "decree" is defined in s. 2 of the Code of Civil Procedure. It is not a "formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." The "right claimed or defence set up" referred to in the definition of "decree" must be a right claimed or a defence set up in the suit or appeal, and not a right to have the suit or appeal heard on a particular stamp or the plaint or the memorandum of appeal rejected on account of the stamp. An adjudication under s. 5 of the Court-fees Act as to the stamp by the taxing officer, the Chief Justice or the Judge appointed for that purpose is not an adjudication, which, to use the words of s. 2 of the Code of Civil Procedure "so far as regards the Court expressing it, decides the suit or appeal."

In my opinion ss. 540 and 584 do not apply to decisions under s. 5 of the Court-fees Act, and an order under clause *(a)* or *(b)* of s. 54 of the Code of Civil Procedure, so far as it is a decision on a "question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal" within the meaning of s. 12 of the Court-fees Act, is final and within the exception contained in ss. 540 and 584 of the Code of Civil Procedure.

As to s. 5 of the Court-fees Act, there is no provision so far as I can ascertain under which the Court or any Bench of the Court has power to consider the propriety of a decision under that section

by appeal, in an appeal, or in revision. S. 622 of the Code of Civil Procedure would not apply, the reason being that the decision under s. 5 of the Court-fees Act is not the decision of a Court within the meaning of s. 622, nor is it a decision in a case within the meaning of that section, nor could it be said that the taxing officer, even if he took an incorrect view of the case as to the necessity for a fee or as to the amount of a fee, exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction vested in him by law, or acted in the exercise of his jurisdiction illegally, or with material irregularity.

S. 15 of the 24 and 25 Vic., c. 104, is not applicable to decisions by our taxing officer under s. 5 of the Court-fees Act.

A decision under s. 5 of the Court-fees Act by our taxing officer, or by the Chief Justice, or the Judge appointed under that section, is not, as I have pointed out, a decree within the meaning of s. 2 of the Code of Civil Procedure.

The decision of our taxing officer is not an "order" as defined in s. 2 of the Code of Civil Procedure; his decision is not the decision of a Civil Court. It would be anomalous to hold that, although the decision of our taxing officer was not an order as defined in s. 2, the decision of the Chief Justice, or of the Judge appointed under s. 5 of the Court-fees Act on a reference under that section by the taxing officer, is an "order" as defined by s. 2 of the Code of Civil Procedure. I am consequently of opinion that a decision under s. 5 of the Court-fees Act is not a decree or order within the meaning of s. 623 of the Code of Civil Procedure. A further reason for that opinion is that the taxing officer is not a Court within the meaning of that section.

S. 647 of the Code of Civil Procedure obviously does not apply.

Even if a decision under s. 5 of the Court-fees Act could be held to be an order within the meaning of s. 2 of the Code of Civil Procedure, it is not an order within any of the clauses of s. 588 of that Code, and an appeal from it under the Code of Civil Procedure is consequently prohibited by that section.

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A decision under s. 5 of the Court-fees Act of our taxing officer, or of the Chief Justice, or of the Judge appointed under that section, cannot be an order within the meaning of s. 591, as, amongst other reasons, it arises on the memorandum of appeal, and consequently could not be set forth as a ground of objection in the memorandum of appeal.

I have consequently come to the conclusion that not only did the Legislature intend that the decision under s. 5 of the Court-fees Act of the taxing officer of the High Court, or of the Chief Justice, or the Judge appointed under s. 5, should for all purposes be final, but that the Legislature has been careful to avoid providing or suggesting any means by which such a decision might be questioned. Whether or not such decisions ought to be open to appeal, review or revision is another question as to which I do not feel bound to express an opinion.

At one period of the argument the vakíl for the appellant contended that no difference had arisen within the meaning of s. 5 of the Court-fees Act between the officer whose duty it was to see that a fee was paid under chapter ii of that Act and the appellants or their vakíl. I am strongly inclined to think that a difference arose as soon as that officer reported that the stamp was insufficient. In any case we must assume, until the contrary is shown, that our late taxing officer did not act under s. 5 until the difference had arisen and the question had been referred to him, particularly when we find that his decision was accepted without demur by the appellants and acted upon by them.

To take the view that no difference had arisen, and that the taxing officer had made no decision on the question, would be equally fatal to the appellants' case. In that event the report of the officer Dip Chand must, under the circumstances, be deemed to be correct, and it must follow that the memorandum of appeal when tendered to this Court was insufficiently stamped. If the question as to the sufficiency of the stamp, which was on the memorandum of appeal when it was tendered, is still open, then that is a question not for us or for the Bench which has referred to us for our opinion the

question as to limitation, but for the taxing officer, and the appeal under the conditional order of my brother Brodhurst is not, even apart from any question of limitation, yet admitted. The appellants, by supplying through their vakíl the deficiency in the stamp, adopted and acted upon the decision of the taxing officer, which their vakíl would not have allowed them to do if the question had not been referred to and decided by the taxing officer.

Another contention of the vakíl for the appellants was that the order of the taxing officer was an order by the head of an office within the meaning of the second paragraph of s. 28 of the Court-fees Act, and that the order having been complied with, the memorandum of appeal must under that paragraph be treated "as valid as if it had been properly stamped in the first instance." That contention is not, in my opinion, a sound one. "The head of the office" in that section does not refer to the head of the office of a Court, at any rate to the head of the office of the High Court, but to the head of one of the public offices, as, for instance, the Board of Revenue. In one sense no doubt the late taxing officer, as our Registrar, was the head of the office of this Court. He was not, however, in deciding the question before him acting as the head of the office but as the taxing officer of this Court. As head of the office of this Court he had no power to make an order under s. 28 of the Court-fees Act. Such an order could only be made by a Judge of the Court.

No memorandum of appeal can be lawfully filed, registered or used in this Court until it has been admitted by a Judge of the Court. There was in this case, as I read my brother Brodhurst's order of the 9th November 1887, and in view of the stamp report and the decision of the taxing officer, no admission of the memorandum of appeal.

Prior to 1886, no appeal was entered in the register until it was finally admitted. I have now for the first time become aware of the fact that in 1886 an unauthorized practice was introduced of entering in the register appeals which had been only condi-

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tionally admitted and before it had been ascertained that the stamps on the memoranda of appeal were sufficient.

Owing to our not having been unanimous as to the meaning of the term "final" in s. 5 of the Court-fees Act, the vakíl for the appellant was permitted to argue that the memorandum of appeal was properly stamped in the first instance, that is, when it was tendered to my brother Brodhurst on the 9th November 1887. On this question Mr. *Kashi Prasad* cited the following cases: *Chunia* v. *Ram Dial* (1), *Gulzari Mal* v. *Jadaun Rai* (2), *Dildar Fatima* v. *Narain Das* (3), *Narayan Rav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre* (4), *Shama Soondary* v. *Hurro Soondary* (5), *Mahadei* v. *Ram Kishen Das* (6), *Chedi Lal* v. *Kirath Chand* (7) and two unreported cases of this Court, namely, Second Appeal No. 1342 of 1879, decided by Pearson and Oldfield, JJ., on the 3rd of May 1880, and First Appeal No. 119 of 1879, decided by the same learned Judges on the 23rd of December 1880.

Holding the view which I did and still do as to the finality of the decision of the taxing officer, I considered, and still consider, that the question was not open to the appellants. As, however, there was and may be doubt in the minds of some on that question, I shall express my view on it.

In order to do so and before commenting on the cases cited by Mr. *Kashi Prasad* for the appellants, or referring to the cases relied upon by Mr. *Hill* and Mr. *Spankie* for the respondents, it is necessary to see what was the relief sought by the plaintiffs in the plaint, what reliefs were decreed and what were the reliefs sought in the memorandum of appeal.

The respondents, who were plaintiffs below, asked in their plaint that it might be declared that the property mentioned at the foot of the plaint is the joint property of the plaintiffs, and that it is not liable to attachment and sale in execution of the decree, dated the 6th June 1883, held by the defendant No. 4 against the defen-

(1) I. L. R., 1 All., 360.
(2) I. L. R., 2 All., 63.
(3) I. L. R., 11 All., 365.
(4) I. L. R., 4 Bom., 529.
(5) I. L. R., 7 Calc., 348.
(6) I. L. R., 7 All., 528.
(7) I. L. R., 2 All., 682.

dant No. 1. In order to found a case for the latter relief asked for, the plaint alleged collusion, fictitious transactions and want of title.

It has been contended that if the plaintiffs obtained the relief asked for as to the non-liability of the property to attachment and sale, that would have afforded them all the protection which they could require. I propose to show presently why in my judgment that is not the question for the taxing officer to consider. Be that as it may, the plaintiffs were also claiming, as against all the defendants including the decree-holder and Musammat Gijraj Mani Tawarain, a declaration that the property was the joint family property of the plaintiffs. That declaration would not be covered by a declaration that the property was not liable to attachment and sale, nor would a declaration that the property was the joint family property of the plaintiff show without something further that it was not liable to attachment and sale under the decree of the 6th June 1883. In my opinion, however, it is no part of the duty of a taxing officer or of a Judge or Court on a question as to the sufficiency of a stamp or a fee to consider whether a plaintiff or an appellant is asking for more declarations or reliefs than are required for his protection. A plaintiff or an appellant may have reasons, which, whether they are good or bad, may not be apparent to a taxing officer or taxing Judge for asking for several declarations or reliefs. It is not the province of the taxing officer or the taxing Judge to decide what are the declarations or reliefs which a plaintiff or an appellant may require for his protection. To impose upon a taxing officer or the taxing Judge such a duty would be to impose upon him a duty hardly, if it all, less onerous or difficult than the duty of deciding the case itself.

The contention that because those two reliefs are included in one paragraph of the plaint, they must be regarded as one relief only, does not require an answer.

The decree in the suit gave the plaintiffs the declarations which they in their plaint had asked for. By the memorandum of appeal the defendants seek to get that decree, not in part but in whole, set aside.

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The memorandum of appeal was tendered on a stamp of the value of Rs. 10 only.

Now as to the cases cited by Mr. *Kashi Prasad* on this point, the case of *Dildar Fatima* v. *Narain Das* (1) is directly against Mr. *Kashi Prasad's* contention, and the Full Bench case of *Chedi Lal* v. *Kirath Chand* (2), so far as it bears on this contention, is against it and supports my view as to the effect of s. 28 of the Court-fees Act. The case of *Shama Soondary* v. *Hurro Soondary* (3) appears to have little bearing on this contention of Mr. *Kashi Prasad*, but it is a direct authority that no plaint can be accepted or registered until the preliminary questions of valuation and sufficiency of stamp have been determined. The case of *Chunia* v. *Ram Dial* (4) does not support Mr. *Kashi Prasad's* contention, as in that case only one relief was asked for, but it is an example of a case in which this Court held that a question of category was not a question of valuation for determining the amount of a fee within the meaning of s. 12 of the Court-fees Act. The case of *Gulzari Mal* v. *Jadaun Rai* (5) is against Mr. *Kashi Prasad's* contention, as there two reliefs were sought, namely, a declaration of the plaintiff's proprietary right to certain grain and the cancelment of an order made by a Munsif disallowing his claim to the grain, and a fee of Rs. 20, that is, Rs. 10 as the fee in respect of each relief, was paid. In *Narayan Rav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre* (6) the question was whether a declaratory suit could be maintained in that case without a claim for consequential relief. In the case of *Mahadei* v. *Ram Kisken Das* (7) the question was whether the powers conferred by ss. 54 (*a*) and (*c*) and 55 of the Code of Civil Procedure read with s. 582 of that Code and those conferred by ss. 12 or 28 of the Court-fees Act could be exercised after decree made by the Court which made the decree. In the unreported case Second Appeal No. 1342 of 1879, Pearson and Oldfield, JJ., overruled the decision of the then taxing officer of this Court on the question of the amount of the fee payable on the memorandum of appeal in that case. In

(1) I. L. R., 11 All., 365.
(2) I. L. R., 2 All., 682.
(3) I. L. R., 7 Calc., 348.
(4) I. L. R., 1 All., 360.
(5) I. L. R., 2 All., 63.
(6) I. L. R., 4 Bom., 529.
(7) I. L. R., 7 All., 528.

the other unreported case, First Appeal No. 119 of 1879, the same learned Judges considered the decision of the then taxing officer of the Court on the question of the amount of the fee payable on the memorandum of appeal in that case. In each of those unreported cases there was also a question as to an alleged deficiency of fee in the Court below, and in neither of them did those learned Judges refer to the provision in s. 5 of the Court-fees Act, that the decision of the taxing officer should be final. In the latter of those two cases I find in the papers on the record the following memorandum signed by Pearson and Oldfield, JJ. :—"The Registrar's attention is drawn to the circumstance that costs in this case have been incurred because the opposite party was summoned before the question of court-fees had been settled. It would be desirable that such questions should be settled before the admission of appeals." I would have said that it was required by law. On this contention now under consideration Mr. *Spankie* relied upon the two Full Bench cases of *Ram Prasad* v. *Sukh Dai* (1) and *Lachmi Narain* v. *Gauri Shankar* (2), each of which cases was directly in point and against Mr. *Kashi Prasad's* contention, and showed that the stamp of Rs. 10 in this case was not sufficient. Mr. *Spankie* also relied on some of the cases cited by Mr. *Kashi Prasad*.

It is sufficient for me to say that if I was not bound by the Full Bench rulings of this Court on which Mr. *Spankie* relied, I should still be of opinion that the stamp of Rs. 10 on which this memorandum of appeal was tendered to my brother Brodhurst on the 9th November 1887, was an insufficient stamp, inasmuch as two distinct declarations were asked for and obtained and were by the appeal sought to be set aside. What my brother Straight said in delivering his judgment in the case of *Lachmi Narain* v. *Gauri Shankar* (2) at page 55 would apply to the present case, and in that judgment the then Chief Justice and the other three Judges of the Court concurred. That was probably the case which the taxing officer followed here.

(1) I. L. R., 2 All., 720. (2) Weekly Notes, 1886, p. 54.

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The result is that I am of opinion that there is now before this Court no valid appeal as to the merits of which this Court can give a decision.

TYRRELL, J.—I concur in everything that has been said by the learned Chief Justice.

STRAIGHT, J.—I have had the great advantage of perusing the long and learned judgment of the learned Chief Justice, and I think it right to say, in expressing my entire concurrence therein, that I was at one time disposed to arrive at a contrary conclusion to that at which he has arrived, but that his convincing and exhaustive judgment has satisfied me that the question referred to this Full Bench is open to no other answer than that proposed by him.

BRODHURST, J.—I entirely concur with the learned Chief Justice.

MAHMOOD J.—I confess that when the case was argued before the Full Bench, I entertained serious doubts as to whether or not the answer given to the reference by the learned Chief Justice in this case should be the answer given. I entertained these doubts principally because I had difficulty in considering this statute, Act VII of 1870, known as the Court-fees Act of that year, which begins without a preamble, and leaves it to the Judges to decide what its objects were, and to gather those objects from the enacting clauses. The difficulty about the absence of preamble was further enhanced in my mind at the hearing by the circumstance that many of the provisions contained in that Act might possibly give rise to difficulty as to whether they are or are not inconsistent with the provisions of the Code of Civil Procedure. Also the difficulty arose in my mind that inasmuch as this Court-fees Act (VII of 1870) is an enactment anterior to the Code of Civil Procedure, whether Act X of 1877 or Act XIV of 1882, the provisions in these later statutes might not by implication abrogate any of the provisions contained in the earlier Act. My difficulty further arose from the circumstance that I felt, in the absence of a preamble in this Court-fees Act, whether it was intended to regulate

questions of procedure or to regulate the method of the collection of revenue, that is to say, fiscal questions for the purposes of the obtainment of money from the tax-payer in order to achieve such results as the State had in view to carry on the administration of the country.

These were the reasons why in the course of the hearing of the case I entertained serious doubts upon what should be the answer to the question put to the Full Bench. But those doubts have now been removed in common with the view taken by my brother Straight, by the learned judgment delivered by the learned Chief Justice, and in which I entirely concur, especially with reference to the interpretation of the specific requirements of this legislation; Act VII of 1870.

But whilst giving my full concurrence to the views therein expressed, I think it is within my province to point out clearly as a Judge of this Court that I do not understand that the provisions of this Court-fees Act, as they now have been interpreted, can operate otherwise than to retard and in many cases obviate the possibility of justice being done to the parties who did not happen to have sufficient pecuniary means to abide by the stringent requirements of the letter of the statute itself. The enactment, as the learned Chief Justice has explained, is most anxious to collect money from those who seek to obtain justice, but there is not one word in that statute to enable the litigant who is to be subject to these stringent rules to re-obtain the sum of money which he, by dint of a wrongful user of the powers given to the taxing officer, does pay as court-fee, say, for example, Rs. 3,000 instead of Rs. 10, as may be the case where difficulty may arise as to whether a suit or an appeal deals with a declaratory claim or a claim including reliefs of a consequential character. I mention this on purpose, as I hope that this enactment will soon be considered fit to be amended, and that a difficulty such as has arisen in this case may not arise in future, and that no pleas *ad misericordiam* such as were addressed in this very case might be made the subject of consideration by the Judges of a whole High Court established by Her Majesty's Charter.

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The stringency of the Act as it has been now interpreted is probably a good thing for the litigant, because it indicates the necessity of amendment in his behalf. I hold, following the views of Jeremy Bentham, that law taxes, the more stringent they are, the less do they achieve their aim, for they are stringent not in the interests of justice, but make the administration of justice difficult and in many cases impossible.

With these remarks, I concur in the judgment delivered by the learned Chief Justice.

APPELLATE CIVIL.

1890 December 11

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

FAZAL IMAM AND OTHERS (DEFENDANTS) *v.* FAZUL RASUL (PLAINTIFF).*

Suit to recover costs by way of damages—Costs incurred in prosecuting case in Criminal Court.

Held that a suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a criminal Court.

This case was referred by Mahmood, J., to a Bench of three Judges. The order of reference was as follows:—

"This appeal has arisen out of a suit for recovery of Rs. 500, which amount consisted of the following items:—

(1). Rs. 50, expenses of prosecuting the defendant in the criminal Court.

(2). Rs. 40, loss of professional occupation.

(3). Rs. 410, damages for disgrace and mental and bodily suffering.

The quarrel appears to have arisen in consequence of the defendants having assaulted and beaten the plaintiff-respondent, and, in consequence of such assault and beating, he made a complaint to the criminal Court against the defendants, who were fined in the sum

* Second appeal No. 1285 of 1887, from a decree of H. P. Mulock, Esq., District Judge of Sháhjahánpur, dated the 22nd April 1887, confirming a decree of Maulvi Muhammad Safi, Munsif of Sháhjahánpur, dated the 10th December 1886.

of Rs. 20 each by order of the criminal Court, dated 11th January 1886.

The plaintiff-respondent thereafter brought the present action in the civil Court for recovery of damages, and both the Courts below have concurred in holding that he was entitled to maintain the action, that he was entitled to Rs. 40 as damages for the costs of the prosecution which he successfully carried on in the criminal Court, and to Rs. 30 as damages for loss of occupation, and to Rs. 30 as damages for mental and bodily sufferings.

Mr. *Jogindro Nath Chaudhri*, who appears for the appellant, in arguing the appeal, has foregone all points except the one relating to the sum of Rs. 40 claimed as the expenses of the criminal prosecution. The learned pleader argues that those expenses, even upon the findings arrived at by the Courts below, cannot form part of the damages to be awarded in such an action.

In support of this contention the learned pleader relies upon two points.

(1). That the rule relating to expenses incurred in defending a malicious prosecution is not applicable to expenses incurred in prosecuting a criminal cause.

(2). That inasmuch as in the criminal prosecution which ended in the decision of 11th January 1886, the Magistrate could have awarded compensation to the plaintiff under the provisions of the Criminal Procedure Code, therefore the expenses of the criminal prosecution could not form part of a civil action.

For the first of these propositions Mr. *Jogindro Nath* relies upon the English law of torts, and for the second he relies upon *Mahram Das* v. *Ajudhia* (1), which was approved in *Kadir Bakhsh* v. *Salig Ram* (2).

It seems, however, and the learned pleader frankly admits, that the ruling of a Division Bench of this Court in *Ram Lal* v. *Tula Ram* (3) is opposed to his contention, especially the remarks of Oldfield, J. at page 101 of the report.

(1) I. L. R., 8 All., 452. (2) I. L. R., 9 All., 474.
(3) I. L. R., 4 All., 97.

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FAZAL IMAM v. FAZUL RASUL.

I think the case is a fit one to be referred to a Bench of two Judges, and I refer the case accordingly, with the further direction that the case be laid before the learned Chief Justice for orders as to whether the case is not a fit one for decision by a Bench consisting of three Judges."

Babu Jogindro Nath Chaudhri, for the appellants.

The respondent was not represented.

EDGE, C. J.—The plaintiff prosecuted the defendant in a criminal Court for assault. The defendant was convicted. The plaintiff in this suit sues the defendant for, amongst other damages, the expenses which the plaintiff was put to in prosecuting the defendant in the criminal Court. In respect of that head of claim, Rs. 40 have been decreed. The defendant has appealed here on the ground that he is not liable for the expenses of the prosecution or any part of them. There is a judgment of Mr. Justice Oldfield in the case of *Ram Lal* v. *Tula Ram* (1) which justified the Court below in decreeing those damages. My brother Straight and I have on previous occasions dissented from that portion of the judgment of Mr. Justice Oldfield. I am clearly of opinion that the plaintiff cannot maintain his suit so far as that head of claim is concerned. The case of a defendant in a malicious prosecution bringing a civil suit against the prosecutor and obtaining as damages the expenses he was put to in defending himself on the criminal trial has no analogy to the present case. The same view has been held by my brother Mahmood and myself in the case of *Chandan* v. *Sumera* (2). The appeal is decreed, the decree of the lower appellate Court is modified by decreasing the decree of the Court below by Rs. 40. The plaintiff will have proportionate costs in the Courts below, and the appellant will have the costs to the extent of his success here and below.

STRAIGHT, J.—I agree.

TYRRELL, J.—I agree.

Appeal allowed.

(1) I. L. R., 4 All. 97. (2) Weekly Notes, 1887, p. 104.

CIVIL REFERENCE.

1890
January 2.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAZI-UD-DIN (PLAINTIFF) *v.* KARIM BAKHSH (DEFENDANT).*

Act XVIII of 1879 (*Legal Practitioners Act*), *ss.* 27, 28, 29, 30—*Suit by pleader to recover fee from client—Agreement for fee—Agreement not in writing and filed in Court.*

Ss. 27, 28 and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to any arrangements or agreement made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation. They do not provide as to matters which relate to the opposite party, or the fees that he has to pay to the legal practitioner of the opposite party, but provide what, as between the pleader and his client, shall be the method in which certain special arrangements are to be entered into. They make provision for agreements between pleaders and their clients which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation ; and were framed upon the principle which regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client. They were intended to protect necessitous, improvident or careless litigants, from being taken advantage of by unscrupulous legal advisers. *Rama* v. *Kunji* (1) approved and followed.

THIS was a reference under s. 617 of the Civil Procedure Code by the Judge of the Court of Small Causes at Allahabad. The order of reference was as follows :—

" The plaintiff, who is a pleader, has brought this suit to recover from the defendant Rs. 58-1-3 as his fees for having acted as the defendant's pleader in a certain suit. The defendant has not appeared to contest the claim.

" It has been proved that the defendant engaged the plaintiff as his pleader under a *vakalatnama*, dated the 5th January 1886, and that the suit in which the plaintiff's services were engaged terminated on the 24th September, 1886. It is admitted that there was no agreement in writing between the parties as to the plaintiff's fees. It is, however, stated in the plaint that there was an agreement to

* Reference under s. 617 of the Civil Procedure Code by Babu Promoda Charan Banerji, Judge of the Court of Small Causes, Allahabad, dated the 13th November 1889.

(1) I. L. R., 9 Mad., 375.

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pay to the plaintiff his share of the "legal fees" payable to the defendant by his adversary, and the plaintiff has deposed that the agreement was made orally.

"The question which arises for consideration is whether the agreement is valid, having regard to the provisions of s. 28 of the Legal Practitioners Act, which runs thus:—'No agreement entered into by any pleader, mukhtar or revenue agent with any person retaining or employing him respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such pleader, mukhtar, or revenue agent, shall be valid unless it is made in writing signed by such person.'

"According to the provisions of the section quoted above, the agreement on which the plaintiff's claim is founded is not valid, as it was not made in writing.

"It has been urged that s. 28 of the Legal Practitioners Act does not relate to the fees fixed by the High Court as payable by a party in respect of the fees of his adversary's pleader, and that it refers 'to agreements to pay more than such fees.' This contention is supported by a ruling of the Madras High Court in *Rama* v. *Kunji* (1).

"With due deference to the learned Judges who decided that case, I am of opinion that there is nothing in the provisions of the Legal Practitioners Act to support the view which they have taken of the twenty-eighth section of that Act. That section is very general in its terms, and it declares every agreement between a pleader and his client respecting the amount and manner of payments for the services of the former to be invalid unless made in writing and filed in Court. There is nothing in that or any other section of the Act from which it may be gathered that the Legislature intended to restrict its provisions to agreements for higher fees than at the scales provided by the High Court for pleaders' fees payable as between party and party. The intention of the Legislature in enacting that

(1) I. L. R., 9 Mad., 275.

section was stated in the report of the Select Committee, dated the 21st August 1879, on the Bill No. 3 (which was afterwards passed into law with certain modifications) in the following terms:—'We have carefully considered the question which has more than once been discussed, and has now again been raised, as to the necessity of placing some restriction upon contracts regarding remuneration for services performed by legal practitioners.....We think it desirable to provide, as we have done in s. 28, that such agreements when made should be in writing, and should be filed in Court.' The Hon'ble Mr. Whitley Stokes, in placing the report of the Select Committee before the Legislative Council, made the following observations in regard to the alterations made in the Bill:—'One was the provision in s. 28 that agreements between pleader and client regarding the remuneration for services rendered by the former, *should always* be in writing and be filed in Court.'

"These extracts are very useful in enabling one to judge what the object of the Legislature was in enacting s. 28. That section did not appear in the Bills Nos. 1 and 2, but was added to the third Bill, in order, as the Select Committee said, to place some restriction upon contracts between pleader and client regarding the remuneration of the former, and to enable the Court to be informed of the nature of such contracts, and as it was worded in such a way as to include all contracts between pleader and client regarding the former's remuneration, I fail to see how an agreement, whether for prescribed fees or for any other fees, can be valid unless, as required by that section, it be made in writing and filed in Court. The object of the section is to place a check upon contracts between legal practitioners and their clients, and to afford some protection to the clients, and had the Legislature intended to exclude any class of contracts from the scope of the provisions of that section, nothing was easier than to say so in clear terms.

"I am accordingly of opinion that as the contract between the parties in this suit was not reduced to writing and filed, the plaintiff cannot maintain this suit. As, however, my view is opposed to the ruling of the Madras High Court cited above, and there is no report-

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ed ruling of the High Court of these Provinces on the point, and as the question is one of general importance, I submit this case for the decision of the Hon'ble the High Court on the following question:

"Whether an agreement between a legal practitioner and his client for the payment of the fees of the former at the scale prescribed by the High Court in respect of fees payable by a party for the fees of his adversary's legal practitioner, is valid unless made in writing and filed in Court, as required by s. 28 of the Legal Practitioners Act."

STRAIGHT, J.—This is a reference by the Judge of the Small Cause Court of Allahabad under s. 617 of the Civil Procedure Code. The suit to which it relates was instituted by the plaintiff, a pleader of the subordinate Courts, to recover a sum of Rs. 58-1-3, as his share of the amount of fees allowed upon taxation to the defendant as a successful party in a suit brought against him, in which the plaintiff with three other persons, acted as his pleader. No appearance was entered by the defendant to the suit, nor was any defence set up on his behalf. The point that has been taken by the learned Small Cause Court Judge, and which he refers for the decision of this Court, is very fully set out in the order of reference, from which I may quote the following passage:—

"It is admitted that there was no agreement in writing between the parties as to the plaintiff's fees. It is, however, stated in the plaint that there was an agreement to pay to the plaintiff his share of the 'legal fees' payable to the defendant by his adversary, and the plaintiff has deposed that the agreement was made orally."

The question in terms referred to us is:—

"Whether an agreement between a legal practitioner and his client for the payment of the fees of the former at the scale prescribed by the High Court in respect of fees payable by a party for the fees of his adversary's legal practitioner, is vaild unless made in writing and filed in Court, as required by s, 28 of the Legal Practitioners Act."

There is no doubt that the defendant did upon taxation receive into his hands in respect of the amount of pleader's fees allowed at that taxation against the unsuccessful adversary the sum of Rs. 232-5-0; and there is equally no question that the plaintiff's share of that amount was Rs. 58-1-3. The learned Subordinate Judge, having regard to the terms of s. 28 of the Legal Practitioners Act, is of opinion that as there was, upon the admission of the plaintiff, an oral arrangement between himself and the defendant that the remuneration of him, the plaintiff, should be limited to his share of the taxed costs allowed as against the unsuccessful party for pleader's fee, he cannot maintain this suit and it must be defeated because such agreement was not reduced into writing. His reason for referring this matter under s. 617 of the Civil Procedure Code is that there is a ruling of the Madras High Court in *Rama* v. *Kunji* (1) which takes a contrary view, with which he was not disposed to agree.

Before expressing my opinion with regard to the interpretation to be attached to s. 28 of the Legal Practitioners Act and the kindred sections connected with it, I am constrained to remark that I do not think that, in preparing his order of reference, the learned Small Cause Court Judge was right in referring to the objects and reasons which led to the preparation of the Bill which subsequently became the present Act. To say the least, it is an inconvenient practice, and, moreover, it is one that is quite irregular.

Now the provisions of the Legal Practitioners Act, with which I am more particularly concerned in disposing of this reference, are ss. 27, 28, 29 and 30 of that statute. S. 27 provides that this Court may by rules fix and regulate the fees payable by any party in respect of the fees of his adversary's advocate, pleader, vakil, mukhtar, &c., in the subordinate Courts, and those fees have been by rule of this Court declared and determined and are based on a particular rate in reference to the valuation of the suit. Having made that provision the statute then goes on, in ss. 28, 29 and 30 to provide not as to matters that relate to the opposite party or the

(1) I. L. R., 9 Mad., 375.

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fees that he has to pay to the legal practitioner of the opposite party, but to provide what as between the pleader and his client shall be the method in which certain special arrangements are to be entered into; and in my opinion these sections do not relate to any arrangement or agreement which is made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation. Otherwise this extraordinary state of things would arise, that if there was no agreement, the pleader would get nothing though entitled to his fees; that is to say, he could not succeed in getting them because he had not entered into any written agreement with his client. The result would work grave mischief in this way, that as in the present case the litigant, having received the full amount of the taxed pleader's fee allowed against his adversary, could put them into his pocket and say :—"You, the pleader, are not entitled to a pice of the money, because there was no agreement to pay you the taxed fee, and therefore you have no claim against me." I cannot believe that the Legislature ever contemplated or intended anything so absurd, or that they meant that in every case there was to be a written agreement. Until corrected by higher authority, I will not construe the statute in such a way as to make it appear so ridiculous. What these sections, in my opinion, did contemplate, was to make provision for agreements made between pleaders and their clients which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation. They were framed upon the principle which rightly recognises and regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client. They were intended to protect necessitous, improvident or careless litigants from being taken advantage of by unscrupulous legal advisers. I think the justification of what I am saying is to be found in s. 29 of the Legal Practitioners Act, which says that where a suit is brought to enforce any such agreement as is mentioned in s. 28, it lies, as it always does lie, upon a person standing in the position of active confidence to show that the agreement was a fair and reasonable agreement; and if he does not do so, "the Court may reduce the amount pay-

able thereunder, or order it to be cancelled, and the costs, fees, charges and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made."

Now it seems to me that the very terms of that section give an index of the nature of the agreement in contemplation in s. 28; because the terms of s. 29 would be wholly inapplicable to a case in which a man had agreed to take only and nothing more than the amount allowed on taxation, as in such a case no question could arise as to the fairness and reasonableness of the agreement. That being so, and this being the fair construction to be placed upon these sections, I am very clearly of opinion that the ruling of the Madras High Court was a right ruling and that we ought to follow it. With this intimation I direct that this reference be returned to the Small Cause Court Judge for him to proceed with the case. The costs of this proceeding here will follow the result.

BRODHURST, J.—I concur.

APPELLATE CIVIL.

1890
January 3.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SHADI LAL (PLAINTIFF) *v.* THAKUR DAS AND OTHERS (DEFENDANTS).*

Mortgage—Hypothecation of "our zamíndári property"—Ascertainment of mortgagors' zamíndári interest at date of mortgage—Mortgage not void for uncertainty—Act IX of 1872 (*Contract Act*), *s.* 29—*Act IV of* 1882 (*Transfer of Property Act*) *s* 58.

A deed of simple mortgage described the mortgaged property as "our zamíndári property" (*zamíndári apni*), and gave no further specification or description. It was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two zamíndáris.

Held that the words "our zamíndári property" were sufficiently certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific zamíndári interest; and that the mortgage was therefore not void for uncertainty.

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* Second appeal No. 542 of 1889 from a decree of H. P. Mulock, Esq., District Judge of Sháhjahánpur, dated the 1st February 1889, confirming a decree of Maulvi Fida Husain, Munsif of Sahaswan, dated the 20th March 1888.

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Kanhia Lal v. *Muhammad Husain Khan* (1), *Bishen Dayal* v. *Udit Narain* (2), *Ramsidh Pande* v. *Balgobind* (3), *Rae Manik Chand* v. *Behari Lal* (4), *Deojit* v. *Pitambar* (5), *Tailby* v. *The Official Receiver* (6) and *Tadman* v. *D' Epineuil* (7) referred to.

THE plaintiff in this case sued to enforce a deed of simple mortgage against the defendants, by whom the deed had been executed. By it the defendants hypothecated "our zamíndári property" (*zamíndári apni*), without further specification or description of such property. The sum secured by the mortgage was Rs. 50. The deed bore date the 29th June, 1873. The suit was instituted on the 7th March, 1888, in the Court of the Munsif of Sahaswan.

The Court of first instance dismissed the suit. On appeal, the District Judge of Sháhjahánpur affirmed the Munsif's decree, upon the following grounds :—

"The wording of the deed is bad for ambiguity, and the plaint is bad for omission. The instrument begins by describing the mortgagors as residents of Tarapur. It goes on to recite the consideration, and states that as security for the loan the mortgagors hypothecate their landed property (*zamíndári apni*), without any other detail of such property. Now it is admitted that, at the time of the mortgage, the mortgagors possessed shares in two villages, Tarapur and Sidhpur. The plaintiff prays for enforcement of his lien against Tarapur only, and not Sidhpur, and makes his witnesses say that they remember, fifteen years after, that the mortgagors expressed verbally the fact that Tarapur alone was hypothecated. Even if this evidence were admissible, I think it worthless after so long a lapse of time.

"But I think the indefinite hypothecation is too vague and general to be acted upon.

"The High Court of these Provinces in *Deojit* v. *Pitambar* (5), a case almost exactly similar to the present, has ruled that "distinctness in the description of property mortgaged is essential." The Madras High Court has also ruled in *Bheri Dorayya* v. *Maddipatu*

(1) I. L. R., 5 All., 11.
(2) I. L. R., 8 All., 486.
(3) I. L. R., 9 All., 158.
(4) N.-W. P. H. C. Rep., 1870, p. 263.
(5) I. L. R., 1 All., 275.
(6) L. R., 13 App. Cas., 523.
(7) L. R., 20 Ch., D. 758.

Ramayya (1), that a promise to pay out of the debtor's property indefinitely cannot create a charge on specific property.

"The plaintiff has elected to proceed against one particular property, and I hold that the hypothecation in the bond is of too general a nature to admit of a decree being given against that particular property. The bond must therefore be regarded in the light of a simple money bond, and as such its recovery is barred by limitation. The appeal is dismissed with costs.

The plaintiff appealed to the High Court.

Mr. *A. Strachey* and Pandit *Sundar Lal*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

STRAIGHT, J.—There is only one question raised in this second appeal, and that is whether the learned Judge was right in holding that the terms of the mortgage deed in this case were such as to render it bad for ambiguity. The suit was one brought upon a simple mortgage, dated the 29th June 1873, and by the instrument of mortgage the mortgagors hypothecated until payment of the principal sum of the mortgage with the interest thereon "our zamíndári property." It is found as a fact in the case and is not disputed, that at that date the mortgagors had a certain ascertained and definite fractional share in the zamíndáris of Tarapur and Sidhpur, and I have no doubt whatever that when the instrument of mortgage was made, it was those interests that they intended to charge in favour of the plaintiff. From that time until the institution of the present suit it was never suggested that the charge held by the mortgagee was ineffectual to bind the zamindári interests of the mortgagors in those two villages. The learned counsel on behalf of the plaintiff, who is seeking to enforce his security against one of those villages, namely, the village of Tarapur, has contended that, looking to the fact that the mortgagors were owners of the zamíndári interest in those two villages at the date of the mortgage, there is no ground for saying that the terms of the mortgage-deed were, as described by the learned Judge, bad for ambiguity. In support of his contention he has referred to a number of cases, among them

(1) I. L. R., 3 Mad., 35.

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to *Kanhia Lal* v. *Muhammad Husain Khan* (1), *Bishen Dayal* v. *Udit Narain* (2) and *Ramsidh Pande* v. *Balgobind* (3), and two other cases are *Rae Manick Chand* v. *Behari Lal* (4) and *Deojit* v. *Pitambar* (5). He has also called our attention to the cases of *Tadman* v. *D' Epineuil* (6) and *Tailby* v. *The Official Receiver* (7).

On the other side Mr. *Durga Charan*, in support of the judgment of the learned Judge, has relied upon the cases reported in I. L. R., 1 All. 275, I. L. R., 2 All. 449, I. L. R., 3 Calc. 336, and I. L. R., 7 Calc. 196.

No doubt all the authorities referred to are useful and instructive as guides to assist in the determination of the question raised, though it is not one for the decision of which any general rule can be laid down, because in my opinion its decision must turn upon the exact terms used in the particular instrument, and upon the particular circumstances that led up to and surrounded the creation of that instrument.

Now the contract law of this country provides that agreements the meaning of which is not certain or capable of being made certain are void, and in reference to contracts of mortgage it is also clear that a mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of the money advanced, or for any other of the purposes mentioned in s. 58 of the Transfer of Property Act. What then I have to ask myself, looking at the terms of this contract of mortgage of the 29th June 1873, is this, is the meaning of the language used so uncertain or incapable of being made certain, that it shonld be regarded as a void contract, for this is what the defendant in point of fact asks us to do, namely, to treat this instrument as nothing more than an instrument which rendered him liable personally to pay the amount of the mortgage debt. Now in my opinion the words "our zamíndári property," looking to the fact that at the date of that instrument the two mortgagors were possessed of specific interests in

(1) I. L. R., 5 All., 11.
(2) I. L. R., 8 All., 486.
(3) I. L. R., 9 All., 158.
(4) N-W P. H. C. Rep. 1870, p. 263.
(5) I. L. R., 1 All., 275.
(6) L. R., 20 Ch., D. 758.
(7) L. R., 13 App. Cas., 523.

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immoveable property in the two villages of Tarapur and Sidhpur, were sufficiently certain, or at any rate were capable of being made certain, as they have been made certain by the proof given in this case of the fact of the mortgagors being the owners of a specific zamíndári interest at the date of the mortgage deed. The case recently decided by the learned Chief Justice and my brother Tyrrell of *Ramsidh Pande* v. *Balgobind* (1), undoubtedly goes a long way, and with the most profound respect for the two learned Judges who gave that judgment, I confess that I should have had some difficulty in assenting to the conclusion at which they arrived; though at the same time there is as much to be found in the judgments in the case of *Tailby* v. *The Official Receiver* (2) already mentioned, which goes to support their view. I must add that I find it difficult to reconcile the views expressed by this Court in the two cases of *Rae Manick Chand* v. *Behari Lal*, (3) and *Deojit* v. *Pitambar* (4).

I think that the learned counsel on behalf of the appellant has made good the only point that he has taken in support of his appeal; and decreeing the appeal I reverse the decision of the learned Judge and remand the case to him for restoration to his file of pending appeals and disposal according to law. Costs will be costs in the cause.

BRODHURST, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Mahmood.

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January 7.

FAKIR-ULLAH AND ANOTHER (JUDGMENT-DEBTORS) *v.* THAKUR PRASAD (DECREE-HOLDER.)*

Execution of decree—Application for execution withdrawn by decree-holder—Rule in Sarju Prasad v. *Sita Ram explained—Civil Procedure Code ss.* 373, 647.

The ruling in *Sarju Prasad* v. *Sita Ram* (5) only decided that where the circumstances in regard to an application for execution of decree show that it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent

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* First Appeal, No. 26 of 1889, from an order of Pandit Bansidhar, Subordinate Judge of Allahabad, dated the 18th December 1888.

(1) I. L. R., 9 All. 158.
(2) L. R., 13 App. Cas. 523.
(3) N.-W. P., H. C. Rep., 1870, p. 263.
(4) I. L. R., 1 All. 275.
(5) I. L. R., 10 All., 71.

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application made by that decree-holder for execution is prohibited by s. 373 read with s. 647 of the Civil Procedure Code.

But where a Court of its own motion, and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution.

A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution, and upon the statement of the decree-holder's pleader "that at present the case may be struck off." No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code. *Sarju Prasad* v. *Sita Ram* (1) explained and followed. *Ram Rup* v. *Lalji* (2). *Mahtab Kuar* v. *Sham Sunder Lal* (3) and *Hira Singh* v. *Joti Prasad* (4) distinguished.

Observations as to the necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits. Under s. 647 of the Civil Procedure Code, the provisions relating to proceedings in suits are to be followed and adopted in execution proceedings, so far as they may be fairly and properly applicable thereto.

THE facts of this case were as follows :—On the 11th April 1883, a decree was passed by the High Court reversing a decree of the Court of first instance, dated the 21st December 1881, which had dismissed the suit of the plaintiff, Thakur Prasad, against the defendants Fakirullah and Kamaruddin. The effect of the High Court's decree was to enforce a deed of simple mortgage executed in 1869, by which the judgment-debtors, in consideration of an advance of Rs. 1,000, hypothecated to the decree-holder their immoveable property.

On the 29th August 1885, an application was made on behalf of the decree-holder for execution of the decree. On the 5th January 1886, the Court executing the decree (the Subordinate Judge of Allahabad) passed an order of which the following is a translation :—

"To-day this case came on for hearing; on behalf of the decree-holder, no prosecution has taken place, and the pleader of the decree-

(1) I. L. R., 10 All., 71.
(2) Weekly Notes, 1888, p. 253.
(3) Weekly Notes, 1888, p. 272.
(4) Weekly Notes, 1889, p. 204.

holder states that at the present the case may be struck off. It is ordered that this case, for want of prosecution, be struck off from arrears, with present costs."

On the 24th August 1888, a fresh application for execution of the decree was made on behalf of the decree-holder: This application was resisted by the judgment-debtors, on the ground that it was barred by s. 373 read with s. 647 of the Civil Procedure Code, in reference to the ruling in *Sarju Prasad* v. *Sita Ram* (1).

The Court of first instance disallowed the objection, and granted the application for execution. The judgment-debtors appealed to the High Court. The appeal came in the first instance before Mahmood, J., who passed an order referring it for disposal to a Bench of two Judges.

Munshi *Ram Prasad*, for the appellants.

Mr. *C. Ross Alston*, for the respondent.

STRAIGHT, J.—This is a first appeal on the execution side from the order of the Subordinate Judge of Allahabad, dated the 18th December 1888. The case came before my brother Mahmood in the exercise of his jurisdiction as single Judge, and he thought it desirable, having regard to the questions raised, that it should be referred to a Division Bench of two Judges. Consequently it has come before my brother Mahmood and myself for disposal, and we have heard Mr. *Ram Prasad* on behalf of the judgment-debtors appellants and Mr. *Alston* on behalf of the decree-holder respondent. If I may say so, I think it is so well that my brother Mahmood did refer this case in order that this Bench, which decided the case of *Sarju Prasad* v. *Sita Ram* (1), might in no uncertain tones express definitely what the meaning of that ruling is, and so, as far as possible, guard against future misinterpretation or misunderstanding. I think it my duty by way of preliminary remark to say this much, that my experience, sitting as a Judge of this Court, has been to show that in a large number of instances decrees are obtained by persons against others, more particularly upon bonds and mortgage-

(1) I. L. R., 10 All., 71.

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securities, not so much for the purpose of executing those decrees as to enable them to hold them *in terrorem* over their judgment-debtors while for a long period of time interest is allowed to go on accumulating. I therefore feel strongly that it is incumbent upon us to press on the subordinate Courts the necessity for strictness in the procedure in regard to proceedings in execution. In the present case the first decree with which we are concerned was dated the 21st December 1881, and the appellate decree was one of this Court dated 11th April 1883. The first application for execution was made upon the 29th August 1885. The decree related to a simple mortgage transaction, evidenced by a deed of mortgage of the year 1869, by which the judgment-debtors mortgaged their immoveable property for an advance of the sum of Rs. 1,000. The application of the plaintiff now, which is the subject-matter of the present proceedings, was made upon the 24th August 1888, and it demands to realize as against the judgment-debtors the sum of Rs. 10,320. Now I am not allowing myself, in deciding this question of law, to be influenced by the circumstance that an original debt of so small an amount has swollen to so large a sum. I am well aware that both as regards the lenders of money and the persons who borrow, there are faults on both sides, and I know that persons who borrow money often throw difficulties in the way of their creditors obtaining payment of their debts. But equally clear it is that decree-holders are extremely dilatory in the enforcement of their decrees. In the present case I will not say that the decree-holder has been dilatory, but I am bound in dealing with the question of law to ascertain the rule that applies, independent of any consideration as to whether there has or has not been dilatoriness on the part of the decree-holder. Now experience shows me that proceedings in execution in the subordinate Courts are too often treated as a very subordinate part of the duties they have to discharge, and thus decree-holders come to look upon them only as a matter of form, and think that all they have to do is to put in applications for execution from time to time, without taking any steps to deposit process fees or to do anything further for their prosecution; the object simply being to protect themselves from the operation of the limitation law. As

I have said, the proceeding before us was inaugurated by a petition dated 24th August 1888, and the sole question to consider is whether that application was or is prohibited by any rule of the law of procedure.

In the case of *Sarju Prasad*, the name of which has become so familiar to the practitioners at the Bar, and I have no doubt is equally well known to decree-holders, the point decided was neither more nor less than this, that where the circumstances and the facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder was prohibited by the rule of s. 373 of the Civil Procedure Code read with s. 647 of the same Act.

Now I desire to say emphatically, and the subordinate Courts will do well to take notice of it, that procedure in execution is not to be conducted in a slipshod and slovenly fashion as if it were a very unimportant branch of the work they have to do in the administration of justice. It ought to be conducted with as much gravity, care and decorum as the procedure in suits, and, if anything, with more care and attention, because of the difficulties that so frequently arise. The Courts are bound to look to the Civil Procedure Code for the procedure they should follow in those execution proceedings, for s. 647 provides that "as far as it can be made applicable," the procedure in suits is to be followed and adopted in such proceedings; of course those provisions cannot in every respect be strictly applied, but as far as they may be fairly and properly applicable to execution proceedings, so far they should be applied.

In *Sarju Prasad's* case my brother Mahmood and I, not lightly but after most anxious consideration, came to the conclusion that the principle of s. 373 was properly applicable to execution proceedings, and it seemed to us that where a decree-holder was represented in an execution proceeding by a pleader who came into Court and said, "at present I am not desirous to proceed with this application, owing to errors in its form, and I ask that it may be struck off,"

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he must have contemplated and intended that it should be struck off, and if he did not ask the sanction of the Court to put in a fresh application, he was in no better position than a pleader who appears for a plaintiff in a suit and says the same thing, in which case s. 373 would admittedly apply. In *Sarju Prasad's* case the decree-holder was represented by a legal adviser whose duty it was, if he wished to protect his client's interests, to have applied to the Court, when withdrawing his application, for such a permission as left it open to him to come with a fresh application. This is all that the case of *Sarju Prasad* decided. And it has been approved by the learned Chief Justice in L. P. Appeal No. 14 of 1888, and I believe by the other Judges of this Court. It is said by Mr. *Alston* for the decree-holder that there are rulings to be found in *Weekly Notes*, 1888, pp. 253 and 272 and *Weekly Notes*, 1889, p. 204, and an unreported ruling S. A. 371 of 1888, all of which were decided by my brother Mahmood as single Judge; and that in them he has departed from the principle of *Sarju Prasad's* case, and that to this extent the authority of that ruling has been diluted. I have examined all these rulings, and I am satisfied that they are in no sense departures from the ruling in *Sarju Prasad's* case. What I understand my brother Mahmood to have said in those cases, and what appears to me to be the broad distinction that he has drawn in those cases as differentiating them from *Sarju Prasad's* case, is that where a Court of its own motion and without being moved either by the decree-holder or by his pleader takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Civil Procedure Code which would stand in the way of or bar a decree-holder from coming with a fresh application, or a renewal of such irregularly disposed of application. Speaking from memory and not having the case to hand, I believe the learned Chief Justice has expresed himself much to the same effect, and I myself have said the same thing in a judgment not long since delivered. It is obvious that the striking off an execution application under circumstances not warranted by any provisions of the Civil Procedure Code cannot be regarded as a bar to any subsequent application. On the other hand, where an appli-

cation is made by a decree-holder's pleader of the kind that is covered and contemplated by s. 373, it does come within the provisions of that section, and unless permission is granted the subsequent application is barred. This is the shape in which this case presents itself to my view, and I have simply to ask myself whether the proceeding recorded by the Subordinate Judge on the 5th January 1886 is a bar to the present application of the 24th August 1888. It is recorded by the learned Subordinate Judge in the proceeding of that date that the decree-holder's pleader said "at present let the case be struck off. It is ordered that the case for want of prosecution be struck off from arrears with costs."

Now I say no more than this with reference to some remarks that appear in the course of the learned Subordinate Judge's order, that I think it a pity he has made one or two statements which seems to me to show a want of recognition of the principles of law and the rules of procedure which should direct and control the Courts in discharging their functions in connection with the administration of civil justice. I take no further note of those remarks because I am bound by the Subordinate Judge's order as recorded by him upon the 5th January 1886; that is to say, in the exact form and terms of the order as then made. Then the question is, is that order such an order as is covered by the decision in *Sarju Prasad's* case? I am unable to draw any distinction, and it seems to me directly applicable. Under these circumstances, I am of opinion that this appeal should be decreed, that the order of the Subordinate Judge should be set aside, and that the application of the 24th August 1888 should be held to be barred by the rule of s. 373, and that the judgment-debtors should have their costs throughout the execution proceedings.

MAHMOOD, J.—I agree in what has fallen from my learned brother, and I should not have desired to add anything to what he has said but for the circumstance that this is a case which has come before a Bench of two Judges by reason of my referring order of the 26th April 1889, for the specific purpose of the question being considered whether or not the ruling of this very Bench in *Sarju Prasad* v. *Sita*

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Ram (1) had or had not been properly interpreted by me in the single Bench when dealing with these execution cases without the help of a colleague. The first case before us and the leading case upon the subject is the case of *Sarju Prasad* v. *Sita Ram* (1) to which I have referred. I believe the first occasion upon which I had to deal with it in the single Bench, at least so far as the printed cases go to show, was the case of *Mahtab Kuar* v. *Sham Sunder Lal*, (2) and in reference to the ruling of my brother Straight and my own I summed up our conclusions. To use my own words, "we then concurrently held that with reference to the second paragraph of s. 373 read with s. 647 of the Code, a decree-holder was precluded from again applying for execution when a previous application for execution was withdrawn by him on account of formal defects, and he withdrew from prosecuting such application without obtaining permission to file another application which would not be open to objection." This was my interpretation in that case. Then comes the case of *Ram Rup* v. *Lalji* (3) which perhaps is the only case which might even furnish the semblance of the suggestion made by Mr. *Alston* that I had departed from the rule laid down in *Sarju Prasad* v. *Sita Ram* (1). What really was the case in *Ram Rup* v. *Lalji* (3) is best represented by the judgment, and there the words I think are clear enough, when I said referring to the case of *Sarju Prasad* v. *Sita Ram* (1),—"But that ruling is limited to cases where the decree-holder himself withdraws the application for executing the decree, and cannot be applied to cases such as those where no such withdrawal of the execution application by the decree-holder has been made, and here this last application for execution is within the period of limitation."

The same was the reason in the case of *Hira Singh* v. *Joti Prasad* (4) where I again held, pointing out the specific scope of the ruling in *Sarju Prasad* v. *Sita Ram* (1), that the mere fact of an application for execution of decree being struck off for default of prosecution was not to be regarded as barring a subsequent application by reason of s. 373 of the Civil Procedure Code, read with s. 647 of the same.

(1) I. L. R., 10 All. 71.
(2) Weekly Notes, 1888, p. 272.
(3) Weekly Notes, 1888, p. 253.
(4) Weekly Notes, 1889, p. 204.

It seems to me that in dealing with this class of pleas which bar either a regular suit or any miscellaneous proceedings under the Code of Civil Procedure, there is often much confusion between pleas such as *res judicata* and pleas other than the plea of *res judicata* arising out of other provisions of the law of Civil Procedure. It is needless to say that the plea arising out of s. 373 of the Code is not a plea of *res judicata*, and is to be dealt with within the four corners of the provisions of that section itself. Now that section, as my learned brother has just pointed out, must be taken to be the solitary authority, by dint of s. 647 of the Code, which would render any procedure such as that formulated in the Subordinate Judge's order of the 5th January 1886, to be applicable to such a case, that otherwise there could have been no such order. The words of the order are, in the original Hindustani, very clear :—

"Aj yeh muqadmá pesh huá minjánib ḍigrídár ke koi pairawi ạmal maṇ nahiṇ áí aur vakíl ḍigrídár ne bayán kiá ke bilfạl yeh muqadmá khárij kar diá jáwe.

Hukum húá ke yeh muqadmá ạdam pairawi meṇ mae kharcha hál báqiyát se khárij ho."

I translate these words literally in the following manner :—

"To-day this case came on for hearing. On behalf of the decree-holder no prosecution has taken place, and the pleader of the decree-holder states that at present this case may be struck off. It is ordered that this case for want of prosecution be struck off from arrears with present costs."

Now I have translated this order literally to show that the effect of it is identical with the terms used in the case of *Sarju Prasad* v. *Sita Ram* (1), where my brother Straight in delivering his judgment quotes the passage of the prayer of the decree-holder to be in the following terms :—

"For the present we are not anxious to carry on the execution proceedings, and we therefore apply that the case may be struck off." I fully agree with my learned brother in thinking that the

(1) I. L. R., 10 All. 71.

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case is not distinguishable from the case of *Sarju Prasad* v. *Sita Ram* (1), and that we should really be shaking the authority of that ruling, were we to lay down a rule other than that which governed that case.

It was in pursuance of that ruling that I decided S. A. 211 of 1887, by my judgment of 6th February 1888, which judgment was the subject of L. P. Appeal No. 14 of 1888, and which appeal was heard by the learned Chief Justice and my brother Straight. In that case, which is not reported, full consideration of the rule laid down in *Sarju Prasad* v. *Sita Ram* (1) seems to have been before the appellate Bench, and the learned Chief Justice then said,—" With regard to that judgment of my brothers Straight and Mahmood all I need say is that I thoroughly agree with it, and I have reason to know that all the other Judges of this Court agree with it. I think it is well founded in law."

Now I am proud to quote this, because I think, and my learned brother will agree with me in saying, that after this expression of opinion, the ruling in *Sarju Prasad* v. *Sita Ram* (1) is practically of as great an authority as a Full Bench ruling; because none of my brother Judges has attempted to dissent from it. To the views there expressed, and subject to the clear distinction which I have drawn in the cases of *Ram Rup* v. *Lalji* (2) and *Hira Singh* v. *Joti Prasad* (3), I still adhere. And I am particularly satisfied after the considerations which my brother Straight has expressed in delivering his judgment in this case, that that ruling should be adhered to and its authority not shaken by any argument which may render it possible for decree-holders to hold their decrees *in terrorem* over the heads of the judgment-debtors, or to play with the Court for the purposes of execution by making applications without desiring to execute them. One more consideration in favour of this view is that I think the law when it prescribes rules of limitation and rules of procedure such as s. 373 of the Civil Procedure Code, must have anticipated that civil Courts of justice are not merely instruments and agents for collecting money, but tribunals for doing

(1) I. L. R., 10 All. 71. (2) Weekly Notes, 1888, p. 253.
(3) Weekly Notes, 1889, p. 204.

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justice. I am not going beyond the limits of judicial etiquette when I say that in many of these money-claims the decree-holders instead of obtaining the satisfaction of decree by ordinary process, instead of employing agents who may go round and collect debts as would ordinarily be the way in civilized countries, money-lenders and decree-holders in this country sue for the debt to obtain a decree and take out the process of law for doing that which might easily have been done otherwise if proper and ordinary precaution had been taken. The Courts of justice are bound to accede to the prayer even of such decree-holders and where their duty consists in being mere collecting agents for those persons. But then those debts must be such as do not go beyond the Procedure Code. And s. 373 is one of the most important checks upon the abuse of judicial process which the Legislature in its wisdom has thought fit to place upon decree-holders. I agree in the order which my brother Straight has made.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1890 *February 7.*

HANUMAN SARAN SINGH AND ANOTHER (DEFENDANTS) *v.* BHAIRON SINGH (PLAINTIFF).*

Mortgage—Foreclosure—Regulation XVII of 1806, *s.* 8—*Notice of foreclosure—Notice not signed by Judge.*

Held that where the notice of foreclosure under s. 8 of Regulation XVII of 1806 was signed not by the Judge but only by the Munsarim, the foreclosure proceedings were void *ab initio.*

Held also that the notice which was upon the record of the foreclosure proceedings and bore the mortgagor's signature must be regarded as the original notice in the matter; and that the acknowledgment of receipt of notice by the mortgagor did not cure the inherent defect of its non-signature by the Judge.

This was a suit for redemption of a mortgage dated the 25th December 1856. The defendants resisted the claim on the ground that they had acquired an absolute title to the property in suit by reason of certain foreclosure proceedings taken on the 20th June

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* Second Appeal No. 1080, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 30th March 1887, confirming a decree of Pandit Raj Nath, Munsiff, dated the 10th December 1886.

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1868, since which date they had been in possession as owners. The application for foreclosure was made on the 17th March 1868. The plaintiffs alleged that the foreclosure proceedings were invalid on the ground that the notice of foreclosure was not signed by the Judge, and was not served upon them.

The Court of first instance (Munsif of Benares) found that the notice of foreclosure on the record, and dated the 8th April 1868, had been signed by the Munsarim instead of by the Judge, as required by s. 8 of Regulation XVII of 1806, and did not bear the seal of the Court. It held, referring to *Basdeo Singh* v. *Matadin Singh* (1) and *Sitla Bakhsh* v. *Lalta Parsad* (2), that the irregularity vitiated the foreclosure proceedings, and that it was therefore unnecessary to consider whether the notice had or had not been served on the plaintiffs. The Court decreed the claim.

The defendants appealed to the District Judge of Benares, who dismissed the appeal and affirmed the Munsif's decree. The material part of the judgment of the learned Judge was as fallows :—

"There was a point raised which was held to be a fatal defect in foreclosure proceedings—*Seth Harlall* v. *Nanick* (3)—that the notice of foreclosure does not bear the official signature of the Judge. That this is a defect is also noted in the Privy Council ruling in *Madho Prasad* v *Gajudhar* (4) though the Judges do not state explicitly that this defect alone would have caused them to regard the proceedings of foreclosure as invalid.

"In *Doma Sahu* v. *Nathai Khan* (5) the Court was not satisfied that the signature of the Judge's sheristadar was sufficient, but at the same time there are remarks in the judgment that leave it in some doubt whether, in a somewhat different state of things, they might not have formed a somewhat different opinion.

"In *Basdeo Singh* v. *Matadin Singh* (1) referred to in the Calcutta case just quoted, the Court seems to have had before it a

(1) I. L. R. 4 All., 276.
(2) I. L. R. 8 All, 388.
(3) N. W. P. H. C. Rep, 1871, p. 176.
(4) I. L R. 11 Calc, 111.
(5) I. L. R. 13 Calc, 50.

notice not signed by any one, but only sealed with the Judge's official seal.

"The plaintiffs mortgagors did not in this case produce a notice. They refer evidently to the duplicate of the notice upon which the (alleged) acknowledgment of the mortgagor was taken. Now this paper in the record of the foreclosure file does not bear the Judge's signature, only the initials of the Munsarim. It is argued that the Judge's signature may have been on the copy alleged to have been served. But against this there was the necessity that the *record* should contain good evidence of compliance with the requirements of the law, and the mortgagee should have seen that such evidence was secured independently of anything the mortgagor might do or say.

"Assuming that a notice was served, I should consider that it was just as necessary for the copy retained on the record to bear the Judge's official signature as for that handed over: in fact, more necessary. If the question were fresh, there could be much said in favour of the view that the irregularity was not material, but the Allahabad ruling of 1871 is on all fours with the present, and I consider that I am bound by it. I must refuse to interfere with the Munsiff's disposal of the case, and dismiss the appeal of the mortgagees with costs."

The defendants appealed to the High Court.

Munshi *Juala Prasad*, for the appellants.

Pandit *Sundar Lal* and Babu *Gaya Prasad*, for the respondent.

STRAIGHT, J.—It is not denied that the defendants-appellants originally got possession of the property to which the suit relates as mortgagees. They have now obtained an entry in the revenue records of their names as proprietors. The plaintiff as the representative of the original mortgagor under the mortgage of the 25th December 1856 objects to the entry and says, you are still in possession of the property as mortgagees. In my opinion the original possession obtained by the defendants admittedly being that of mortgagees, they are bound to establish that they are not now in

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possession as mortgagees but as proprietors. They took their stand upon certain foreclosure proceedings adopted in 1868, and it rested with them to prove that those foreclosure proceedings were regularly and properly had so as to give them a good title. The learned Judge has found that those proceedings were bad *ab initio* by reason of the circumstance that notice of foreclosure to the mortgagor was not signed by the Judge of the Court issuing it. This finding of fact that the notice was an invalid one and the conclusions drawn therefrom by the District Judge are consistent with numerous rulings both of this Court and of their Lordships of the Privy Council. It is said by Mr. *Juala Prasad*, for the appellants, that the learned Judge had no materials from which he was entitled to draw the conclusions that he did. The learned Judge says that the notice of foreclosure was only signed by the Munsarim and not by the Judge, and that this is correct is shown by the notice itself, which is upon the record of the foreclosure proceedings and bears the signature of the mortgagor. It seems to me that this must be regarded as the original notice in the matter, and that its acknowledgment of receipt by the mortgagor did not cure the inherent defect that there was in it by reason of its non-signature by the District Judge. There was in my opinion material before the District Judge to warant the conclusion at which he arrived, and I dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

EXTRAORDINARY ORIGINAL CIVIL.

1890 *February* 28.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.

Company—Winding up—Application by Official Liquidator for sanction to sale of Company's property—Act VI of 1882 *(Indian Companies Act), s.* 144*(c)—Lease—Covenant against assignment—Covenant not applying to assignments other than by act of parties—Act IV of* 1882 *(Transfer of Property Act), ss.* 10, 12.

The power of the Court under s. 144 *(c)* of the Indian Companies Act (VI of 1882) to give sanction to an Official Liquidator to sell the property of the Company, overrides a private contract against assignment made by the Company.

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A covenant in a lease to a Company provided that the lessees should not "assign, underlet or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns." The Company having gone into liquidation, and the Official Liquidator having applied, under s. 144*(c)* of the Indian Companies Act, for sanction to sell the Company's property, it was objected on behalf of the lessors' assigns that the proposed sale would be in contravention of the covenant.

Held that the covenant did not apply to assignments by operation of law or assignments authorized by statute.

Ss. 10 and 12 of the Transfer of Property Act (IV of 1882) relate only to transfers by act of parties.

THIS was an application made on behalf of the Official Liquidator of the West Hopetown Tea Company, Limited, now in process of winding up in the High Court. The former proceedings in the winding up are fully set forth in the report at I. L. R., 11 All,. 349. By an order passed on the 21st March 1889, the Official Liquidator's application to place the shareholders of the Company on the list of contributories was disallowed. Subsequently the present application was made under s. 144*(c)* of the Indian Companies Act (VI of 1882) for sanction to sell the moveable and immoveable property of the Company, consisting of its tea garden, machinery, &c., by private contract either as a whole or in separate lots.

The application was opposed by the trustees of a deed of trust of the 11th September 1885. The property of the Company, called the West Hopetown estate, was held by the Company under a lease, dated the 14th December 1883, and in the following terms:—

"Whereas Mr. H. Vansittart, late B.C.S., and Mrs. M. A. Vansittart are the proprietors of the West Hopetown Estate, and whereas an agreement for a lease was made with the Manager of the West Hopetown Tea Company, Limited, on the 22nd March 1882, on certain conditions, of a plot of ground of four hundred acres situate in Mulookawala in one square block, now demarcated by boundary pillars, and stretching thence towards Fatehpur between the two ravines the banks of which with a breadth thirty feet were reserved by the lessors for and during the term of one thousand years from the first day of January 1862, at a yearly rent of

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Company's rupees two thousand payable by two half-yearly instalments on the 1st day of January and 1st day of July in each and every year and subject to certain conditions, and whereas a formal lease was either not written or if written has been lost, but nevertheless the rent has been duly paid from time to time t o Mr. H. Vansittart, and whereas the present West Hopetown Tea Company, Limited, is the representative of the lessee and whereas it is desirous to secure its title, and whereas the said Mr. Vansittart and Mrs. M. A. Vansittart are willing to confirm the title of the said Company and that there should be a formal lease: It is therefore agreed between the said Mr. Vansittart on the one part and the said West Hopetown Tea Company, Limited, on the other part as follows. The said Mr. Vansittart and Mrs. Vansittart for themselves and for their heirs, executors, administrators and assigns (hereinafter called the lessors) in consideration of the rents and conditions hereinafter agreed to be paid and performed do hereby lease to the West Hopetown Tea Company, Limited, its successors and assigns all those four hundred statute acres (portion of eight thousand statute acres belonging to the said lessors) on the land known as Mulookawala in the Western Dún now demarcated by boundary pillars and known as the estate of the West Hopetown Tea Company, Limited, during the term of one thousand years from the 20th day of December 1883, at the yearly rent of rupees two thousand payable by two equal half-yearly instalments on the 1st of January and 1st of July of each and every year, and the first half-yearly payment of rent, after satisfaction of all past rents now due to be made on the 1st day of July 1884, free from all taxes, rates, assessments, municipal or local taxes and deductions whatever. The said West Hopetown Tea Company, Limited, for itself, its successors or assigns covenants not to assign, underlet or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns, but the said lessors shall not be required to show their title to grant the said lease, and the said West Hopetown Tea Company, Limited, for itself, its successors or assigns agrees and covenants that the lessors on non-payment of the annual rent of two thousand rupees or any part thereof for twelve

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months next after the same shall have become due, and the same having been first demanded by the said lessors, shall have a right of re-entry on the land leased, and the lessors agree that it shall be lawful for the said West Hopetown Tea Company, Limited, for itself, its successors or assigns to put an end to the said lease on giving, through their Secretary or other legal representative, to the said lessors two years' previous notice in writing of their intention so to do. In witness whereof the said parties have hereunto set their respective hands and seals on this fourteenth day of December eighteen hundred and eighty-three."

The deed of trust of the 11th September 1885 was executed by the lessors, Mr. H. Vansittart and Mrs. M. A. Vansittart, and was as follows:—

"We, the undersigned, being desirous to settle our immoveable property in consideration (valued at Rs. 3,00,000) of natural love and affection for our children and of the satisfaction of promises made to some of them, do hereby give and grant all our immoveable property belonging to us or either of us comprising the Phœnix Lodge Estate at Mussooree and the estates of West Hopetown, Chorba, the villages of Dhaki and Rampur in Western Dún with all leases, rights, titles and interests of any kind that we or either of us have therein unto and to the use of Henry Vansittart, B.C.S., retired, one of the undersigned, and three of our sons, Henry, Herbert Dobbie and Eden, in trust for the following purposes: First, the said Henry Vansittart, one of the undersigned, to have the whole income of the said estates for life; second, after the death of the said Henry Vansittart one of the undersigned should he predecease his wife, Mary Amelia Vansittart, the other undersigned, to pay the whole net income thereof unto the said Mary Amelia Vansittart for her life; and third, after the death of both the undersigned the surviving trustees to hold the said estates on the following trusts, namely, to divide the said trust estate into seven equal shares (and their division and apportionment of shares shall be indisputable by any of the beneficiaries under this deed or any one claiming through them) and to give and deliver one of such shares unto each of my said three sons, Henry,

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Herbert Dobbie and Eden (or if dead to his heirs or assigns), for his own use and benefit absolutely and free from all trusts and to hold a further, that is, the fourth share jointly by them, the said three sons for their own use and benefit absolutely and free from all trust and to hold the fifth, sixth and seventh shares in trust to pay the income of one such share to each of our three daughters, Edith, Katherine Rosamond, Agatha and Florence Mary for their respective lives and should they predecease their husbands to their husbands for their respective lives, provided that should any of the said daughters have issue then one such share to be delivered to her for her own use and benefit absolutely (or if dead to her heirs) and regarding those shares the incomes of which are to be paid to the daughters who die without issue (after the death of their husbands if any) to hold as part of the trust estate and to be divided in accordance with the previous provisions. The trustees or the survivors of them shall have full power at any time to sell any or all the trust property and to invest the moneys as they shall think fit, such moneys and investments to represent the estate and to be subject to all the trusts above mentioned, and they will have power to add to their number and the last surviving trustee can by his will appoint a trustee or trustees and such of the provisions of Act XXVIII of 1866 as are not conflicting with the provisions of this deed shall apply to this deed. Signed and delivered on the 11th day of September 1885."

The trustees under this deed, who had acquired the rights of the lessors under the lease of the 14th December 1883, opposed the present application on the ground that the sale of which sanction was prayed under s. 141*(c)* of the Indian Companies Act, would be in contravention of the covenant in the lease which prohibited the Company from assigning, underletting or parting with any part of the property leased unless with the express consent in writing of the lessors or their assigns.

The application was also opposed by Mr. David Hay, one of the shareholders, upon grounds which it is unnecessary, for the purposes of this report, to state.

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Mr. *A. Strachey*, for the Official Liquidator cited *Vyankaraya* v. *Shivram Bhat* (1), *Tamaya* v. *Timapa Ganpaya* (2) and *Subbaraya* v. *Krishna* (3).

Mr. *C. Ross Alston*, for the trustees under the deed of the 11th September 1885, referred to ss. 10 and 12 of the Transfer of Property Act (IV of 1882).

Mr. *J. C. Mullaly*, for Mr. David Hay.

EDGE, C. J.—This was an application on behalf of the Liquidator of the West Hopetown Tea Company, Limited, for sanction under s. 144 of the Indian Companies Act to sell the moveable and immoveable property of the Company by private contract with power to transfer the same to any person or Company either as a whole or in separate lots. The application is objected to by Mr. *Alston*, who appears on behalf of the trustees of a deed of trust of the 11th September 1885, and by Mr. *Mullaly* on behalf of Mr. Hay, one of the shareholders of the late Company. Mr. *Alston's* objection is that the lease contained a covenant against assignment without the previous consent of the lessors, and he relies on ss. 10 and 12 of the Transfer of Property Act. The covenant is not a covenant against assignments by operation of law, or against assignments authorized by statute. The group of sections among which ss. 10 and 12 come relate to transfers of property by act of parties. That group of sections is headed by a portion of the Act which indicates that the sections relate to transfers by act of parties. Under s. 144*(c)* of the Indian Companies Act the Court has power to give sanction to a liquidator to sell, and that power overrides a private contract against assignment by the parties. Mr. *Alston's* objection, in my opinion, consequently fails.

Mr. *Mullaly* objects on the grounds that, in the opinion of his client, the liquidator should proceed to investigate some dispute between the shareholder whom he represents and some other persons whom he alleges to have brought the Company to grief. How those disputes, if any such exist, should be allowed to interfere

(1) I. L. R., 7 Bom. 256. (2) I. L. R., 7 Bom. 262.
(3) I. L. R., 6 Mad. 159.

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with the realization of the assets of the Company and the liquidation of its debts, is a matter which I fail to understand. In my opinion, we should give sanction to the liquidator to sell the interests of the Company in the property either as a whole or in lots. The liquidator's costs will be paid out of the estate; the other persons who have objected here to-day will bear their own costs.

STRAIGHT, J.—I am of the same opinion.

Application allowed.

1890
January 2.

CIVIL REVISIONAL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAM DAYAL (PETITIONER) *v* RAMADHIN (OPPOSITE PARTY).*

High Court's powers of revision—Civil Procedure Code, s. 622—Suit for arrears of rent—Decision of Collector on appeal from Assistant Collector—Act XII of 1881 (*N.-W. P. Rent Act*), *ss.* 183, 199.

The High Court has no power to revise, under s. 622 of the Civil Procedure Code, an order passed by a Collector under s. 183 of the N.-W. P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. *Hur Pershad* v. *Lalu* (1) distinguished.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Juala Prasad*, for the petitioner.

Munshi *Madho Prasad*, for the respondent.

STRAIGHT, J.—This petition has been presented ostensibly under s. 622 of the Civil Procedure Code for the purpose of inducing this Court to exercise its revisional powers under that section. It appears that a suit was instituted by the petitioner in the Court of the Assistant Collector of the second class for recovery of arrears of rent, amounting to the sum of Rs. 78-14-9. For the purpose of disposing of this case it is not necessary for me to say more in regard to the defence set up in answer to the claim than

* Miscellaneous application No. 276 of 1888 for revision under s. 622 of th Civil Procedure Code.

(1) N.-W. P. H. C. Rep., 1871, p. 60.

that it was based upon a technical objection to the form of the plaintiff's suit. The first Court dismissed the claim, and there was an appeal by the plaintiff to the Collector of the district as provided in s. 183 of the Rent Act. The Collector of the district upheld the decision of the Assistant Collector of the second class, and it is this order of the Collector in appeal which is made the subject-matter of this application for revision. It is objected by Mr. *Madho Prasad*, on behalf of the opposite party, that this Court has no jurisdiction to entertain such an application, for as by s. 183 of the Rent Act the decision of the Collector of the district was final, and as by s. 199 of the same statute provision is made to enable the Board of Revenue as the paramount revenue authority to revise orders of all Courts subordinate to a Commissioner, therefore, there being special provision within the four corners of the Rent Act itself for the revision of such an order as that which is attacked here, this Court cannot exercise its powers under s. 622 of the Civil Procedure Code.

I am of opinion this is a good contention and must prevail. Mr. *Juala Prasad* in support of the petition has referred us to the Full Bench ruling of this Court in *Hur Pershad* v. *Lalu* (1). But with regard to that case it is to be observed that it was before the present rent law came into operation and when Act X of 1859 was in force, in which no provision in the terms of s. 199 of the present Rent Act was to be found. If I were to adopt that ruling as applicable to this case and to accept Mr. *Juala Prasad's* contention, this grave inconvenience and confusion of judicial authorities must ensue, namely, that both the Board of Revenue under s. 199 of the Rent Act, and this Court under s. 622 of the Civil Procedure Code, would have co-ordinate jurisdiction to revise orders of the kind to be found in the present case. I think I am bound in dealing with a question of this kind to guard against so grave a dilemma arising, which I feel sure could never have been intended, and to leave to the Board of Revenue, to whom the power in specific terms is given by the statute, the exclusive jurisdiction

(1) N.-W. P. H. C. Rep., 1871, p. 60.

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thereby in my opinion contemplated and provided. This will certainly procure uniformity of procedure, because while looking to the terms of s. 199 of the Rent Act the Board of Revenue's jurisdiction to deal with those cases in which an appeal lies under s. 189 of the Rent Act is in terms excluded, and naturally, because they go to the Civil Court Judge and to this Court, on the other hand it leaves their jurisdiction untouched to deal with those cases to which s. 189 of the Rent Act is not applicable. I therefore am of opinion that we have no jurisdiction to entertain this application for revision, and I accordingly dismiss it with costs upon that ground.

BRODHURST, J.—I entirely concur.

Application rejected.

APPELLATE CIVIL.

1890
January 7.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

SANKALI (DEFENDANT) *v.* MURLIDHAR AND OTHERS (PLAINTIFFS).*

Appeal—Death of plaintiff-appellant—Rival applicants for substitution—Order under Civil Procedure Code, s. 367, substituting one applicant—No appeal from such order—Unsuccessful applicant attempting to appeal from final decree on appeal—Civil Procedure Code, s. 591—"Error, defect, or irregularity, affecting the decision of the case."

Pending an appeal before the lower appellate Court, the plaintiff-appellant died, and two persons separately applied to be substituted as the deceased's representative. The Court, applying ss. 367 and 582 of the Civil Procedure Code, decided in favour of one of the applicants, and brought him upon the record. No appeal was made against this order by the unsuccessful applicant. The lower appellate Court decided the appeal adversely to the successful applicant. Subsequently the unsuccessful applicant established by a separate suit that she was the deceased's legal representative, and that her opponent was not. She attempted to appeal to the High Court against the lower appellate Court's decree dismissing the appeal.

Held that the appellant not having been a party to the decree below, and the order below having decided that she was not entitled to be a party to the proceedings of the lower appellate Court, she was not entitled to maintain the appeal to the High

* Second Appeal No. 1719 of 1887, from a decree of G. J. Nicholls, Esq., District Judge of Ghâzipur, dated the 15th August 1887, confirming a decree of Munshi Chedi Lal, Subordinate Judge of Ghâzipur, dated the 14th May 1887.

Court, and s. 591 of the Civil Procedure Code was not applicable to the case. *Har Narain* v. *Kharag Singh* (1) distinguished.

Where an order under the group of sections in the Civil Procedure Code relating to representatives has been made excluding a person from the record, that person must seek his remedy by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands.

Error, defect or irregularity within the meaning of s. 591 of the Code, means error, defect or irregularity in procedure or in law, and not in matters of fact. In the present case there was no error, defect or irregularity within the meaning of the section, and even if there were, it did not affect the decision of the case in appeal below.

BENGAL SECRETARIAT LIBRARY.

THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. *T. Conlan* and Mr. *G. T. Spankie*, for the appellant.

Mr. *G. E. A. Ross*, for the respondents.

EDGE, C.J., and BRODHURST, J.—A preliminary objection has been taken by Mr. *Ross* to the hearing of this appeal. In the Court below one Chedi was appellant. Chedi died before the decree in the Court below, and upon his death Musammat Sankali, the appellant here, applied to be brought on as his representative. One Ram Kishan Ram also applied to be brought on as his representative. The Judge below, applying ss. 367 and 582 of the Code of Civil Procedure to the case, decided that Ram Kishan Ram was the representative of Chedi and Musammat Sankali was not, and brought on to the record Ram Kishan Ram as representative of Chedi. From this order Musammat Sankali could have appealed, but she did not appeal. The Court below decided the appeal against Ram Kishan Ram as the representative of Chedi. Musammat Sankali without permission brought this appeal from the decree in appeal of the lower Court. The preliminary objection is that she has no *locus standi* as an appellant.

Mr. *Spankie* has contended that under s. 591 he is entitled to question in this appeal the order of the Court below which dismissed Musammat Sankali's application and brought Ram Kishan Ram on to the record. He has also contended that as his client, the

(1) I. L. R., 9 All. 447.

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SANKALI
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appellant, has since established by a separate suit that she is the representative of Chedi, and that Ram Kishan Ram is not, she was entitled to file this appeal and that permission might be given now after the appeal has been filed. In the case of *Har Narain* v. *Kharag Singh* (1), we decided that an objection to an order of this kind might be taken on the hearing of the appeal, but there is a wide difference in our opinion between that case and this. In that case the appellant who challenged in his appeal an order which had been made by the Court below bringing on a representative of a deceased party, was in fact a party to the decree below, and therefore formally entitled to appeal, being dissatisfied with that decree; but in this case Musammat Sankali was not a party to the decree below, and the order below had decided that she was not entitled to be a party to the proceedings below. The question as to whether the order below was right or wrong went to the very root of the question as to her right to be a party to the proceedings below, or to come here at all in appeal. We are of opinion that where an order under the group of sections relating to representatives has been made excluding a person from the record, that person must seek his or her remedy on appeal against the order, and is not entitled to appeal against the decree so long as the order stands. There is another reason why we think that s. 591 does not authorize the raising of this question here in appeal, and that is, that it does not appear to us that there was any error, defect or irregularity within the meaning of s. 591 in the order below. Error, defect or irregularity within the meaning of that section mean, in our opinion, error, defect or irregularity in procedure or in law, not in matters of fact; and even if there were any error, defect or irregularity in the order, we do not see how any such error, defect or irregularity affected the decision of the case in appeal below. For these reasons we are of opinion that this appeal must be dismissed with costs, and it is so dismissed accordingly.

Appeal dismissed.

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(1) I. L. R., 9 All. 447.

APPELLATE CIVIL.

1890
February 7.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HIKMATULLA KHAN AND ANOTHER (PLAINTIFFS) *v.* IMAM ALI AND OTHERS (DEFENDANTS).*

Mortgage, usufructuary—Act IV of 1882 (*Transfer of Property*), *ss.* 58 (*d*), 98—*Splitting claims—Suit by usufructuary mortgagee excluded from possession for unpaid interest—Cause of action—Subsequent suit for principal and residue o interest barred—Civil Procedure Code, s.* 43.

A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain, that certain interest should be payable, that the mortgagee should have possession, that the profits should be appropriated first in lieu of yearly interest and any balance appropriated in payment of the principal debt, and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal, together with the residue of interest up to the date of suit.

Held that, inasmuch as there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage-money, the instrument did not strictly fall within s. 58 (*d*) of the Transfer of Property Act (IV of 1882), and that the rights and liabilities of the parties must be determined in accordance with the principles enunciated in s. 98 of that Act.

Held, upon the construction of the instrument, that it must be regarded as a usufructuary mortgage not only during the four years, but after their expiration.

Held that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered; that the cause of action to recover the principal accrued at the same time and was the same cause of action; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal; and that the present suit was consequently barred by s. 43 of the Civil Procedure Code.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

* Second Appeal No. 1402 of 1887, from a decree of T. R. Wyer, Esq., District Judge of Sháhjahánpur, dated the 19th May 1887, confirming a decree of Maulvi Muhammad Shafi, Munsif, Shahjahánpur, dated 1st May 1886.

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HIKMATULLA KHAN v. IMAM ALI.

Mr. *Abdul Majid*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

STRAIGHT, J.—This is a suit brought by the plaintiffs-appellants against the defendants-respondents to recover a sum of Rs. 300 principal, and interest Rs. 127, or in all Rs. 427, under the following circumstances :—

On the 8th April 1879, one Musammat Kulsum, the ancestress of the defendants, made a mortgage in favour of the plaintiffs for a consideration of Rs. 300. The terms of the instrument are important, because, according as we decide what was the precise nature of the contract between the parties, so must the question of law which has been raised, as the foundation for this appeal, be determined. According to the instrument of the 8th April 1879, Musammat Kulsum, after reciting the extent of her zamíndári interest in certain properties, went on to say :—"Now, of my own free will, I have mortgaged two and a half biswas out of five biswas, and ten biswas out of twenty biswas zamíndári aforesaid, together with all the rights, *dakhli* and *kharji*, water and forest produce, graves, tanks, village site, self-cultivated, cultivatory holding of tenants and all the items appertaining to the zamíndári aforesaid in lieu of Rs. 300, half of which are Rs. 150, to Wilayat-ullah Khan, resident of Ikhtiyarnagar, for a term of four years with interest at the rate of one per cent. Having received the whole and entire mortgage money from the mortgagee, I have put the mortgagee in possession of the mortgaged property. It is covenanted that the mortgagee having remained in possession will pay the Government revenue, and, after defraying the village expenses, whatever profit will remain, he will credit towards his yearly interest of Rs. 36. Whatever will remain he will credit towards the principal. Should any deficiency arise in the interest, I will pay the same from my own pocket, and the whole money, principal and interest, having been paid at the time of the expiry of the term, the mortgaged property will be redeemed."

The first contention that has been urged before us on behalf of the appellants is that this is not a usufructuary mortgage pure

and simple, within the meaning of cl. *(d)* of s. 58 of the Transfer of Property Act, but that it is a combination of a usufructuary mortgage for a term of four years, and that subsequently to the expiration of those four years it creates a simple hypothecation or charge upon the property theretofore in possession of the usufructuary mortgagee. I agree so far with the learned counsel for the appellant, that the instrument cannot be regarded as strictly falling within the definition of cl. *(d)* of s. 58 of the Transfer of Property Act, because there is no stipulation in terms that the mortgagee is to remain in possession until payment of the mortgage money, and I think therefore that in dealing with this document I must apply the principles enunciated in s. 98 of the Transfer of Property Act, that is to say, I must determine the rights and liabilities of the parties to this instrument as evidenced in the mortgage deed.

Now having given the terms of that instrument the best consideration I can, I have come to the conclusion that what was intended between the parties was, that there should be a usufructuary mortgage for a term of four years certain; that if at the expiration of that period the principal sum and interest were paid up by the mortgagor the mortgage would be redeemed, but that in the event of this not taking place either by reason of the profits having been insufficient to pay the mortgage debt with its interest, or the mortgagor having failed to do so, the mortgage relations between the parties were to continue upon the same terms as theretofore; and that consequently this must be regarded as a usufructuary mortgage not only during the four years but after their expiration. Now having placed that construction upon the instrument, it will be convenient for me to state a few further facts, which raise more directly the point that is taken in appeal. I have said the mortgage was dated the 8th April 1879, and immediately upon the execution of that instrument, it is clear that the usufructuary mortgagees, that is, the plaintiffs in the present suit, were entitled to the possession of the mortgaged estate. But they did not get possession, nor to the hour when this suit was instituted,

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nor at this moment have they ever obtained it. In the month of April 1882 they instituted a suit against the defendants to recover from them the unpaid interest due up to that date upon the Rs. 300, and in that suit they succeeded, and subsequently realized the decree by the sale of certain property belonging to their judgment-debtors. It was contended below that the present suit, which is for the recovery of the principal sum, together with the residue of interest to date of suit, was barred by the provisions of s. 43 of the Code of Civil Procedure; that is to say, that the cause of action upon which the plaintiffs now really come into Court is the same cause of action upon which they instituted their suit in 1882 for the recovery of the unpaid interest. The learned Judge below has held that this is a good contention, and it is his decision upon that point which has been attacked by the learned counsel on behalf of the appellant. The case has been exceedingly well argued on both sides on two occasions, and I have done the best I can to look at it in all its aspects and to come to what appears to me to be that conclusion which is most warranted by the provisions of the law. I cannot help saying in passing that I feel that the conclusion at which I have arrived will have the unfortunate result of enabling these defendants to escape from the payment of a debt which in all honour and conscience they undoubtedly owe to the plaintiff. But there is no rule of procedure which is founded in better reason and good sense than that which prohibits persons who bring suits, from what is called splitting their demands. In my opinion the cause of action which took the plaintiffs into court with their suit in 1882, was the non-delivery of possession of the mortgaged property, by reason of which they had been unable to pay themselves their interest from the usufruct, which they would otherwise have been able to do. That cause of action accrued to them from the very moment the instrument of mortgage came into operation and possession was not given to them; and that was the 8th April 1879. Now, I have before me a ruling of the learned Chief Justice and my brother Tyrrell in *Balgobind Das* v. *Barkat Ali* (1) which goes into this question and

(1) Weekly Notes, 1888, p. 15.

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decides that for the purposes of limitation, there is no continuing breach where the mortgagor fails to give possession of the mortgaged property to his mortgagee under a usufructuary mortgage; but that there is from the very first moment of such non-delivery a breach, and from the date of which time runs. Agreeing as I do in this view, it seems to me that the reasoning in that case with reference to the question of limitation may by analogy be adopted in reference to the question which now arises under s. 43 of the Code of Civil Procedure. In my opinion the plaintiffs' cause of action to recover their principal sum of Rs. 300 accrued to them upon the date when possession of the mortgaged property was first refused to them, and this was the same cause of action which entitled them to claim interest in the month of April 1882, and that when they brought their suit to recover the unpaid interest, which unpaid interest could be only due to them upon the view that the contract to give possession had been broken, they were bound to sue for the principal amount and were not entitled to wait until the four years had expired.

That being the view I have of the case, I am of opinion that the learned Judge was right in the view he took, and I dismiss the appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

1890 *February* 12.

JEMA AND OTHERS (PLAINTIFFS) *v.* AHMAD ALI KHAN (DEFENDANT).*

Limitation—Exclusion of time—Act XV of 1877 (*Limitation Act*), *s.* 14—"*Other cause of like nature.*"

The words "other cause of a like nature" in s. 14 of the Limitation Act (XV of 1877) mean some cause analogous to defect of jurisdiction.

Where a suit was dismissed on the ground that the debt sued for was due not to the plaintiff alone, but to the plaintiff and his partner, the latter not having been joined in the suit; and where the plaintiff subsequently brought a fresh suit for the same debt, making his co-partner a party,

* Second Appeal No. 482 of 1888, from a decree of T. Benson, Esq., District Judge of Saháranpur, dated the 15th December 1887, reversing a decree of Babu Ganga Saran, Munsif of Saháranpur, dated the 18th July 1887.

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Held that the case was not within s. 14 of the Limitation Act, and that the time during which the plaintiff had been prosecuting the former suit could not be excluded in computing the period of limitation prescribed for the second suit. *Ram Subhag Das* v. *Gobind Prasad* (1) and *Chunder Madhub Chuckerbutty* v. *Ram Coomar Chowdry* (2) referred to. *Deo Prosad Singh* v. *Pertab Kairee* (3) not followed.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Srish Chandra Banerji*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

EDGE, C.J., and BRODHURST, J.—The appellant here brought a suit against certain defendants for a debt which was due to the firm of which the appellant was one partner, the other partner in that firm not having been joined in the suit. That suit was dismissed in this Court on the ground that the liability of the defendant was a liability to the plaintiff and his partner and not a liability of the defendant to the plaintiff alone; in other words, that the plaintiff could not maintain that suit for a debt due to the partnership without bringing his co-partner on the record. It was not merely a case of procedure. It was a case of a plaintiff coming into court and failing to prove a cause of action in himself against the defendant, and thus failing to establish the defendant's liability to him, the plaintiff, in the suit. After that suit was dismissed, he brought the present suit for the same debt, having taken the precaution to make his co-partner a party to the suit. The second suit was brought after the period of limitation applicable to the debt, and on that ground the first Court dismissed the suit, and on appeal the lower appellate Court confirmed the decree of the first Court. It is contended here that this is a case within s. 14 of the Indian Limitation Act (XV of 1877) and that the plaintiff's first suit was prosecuted in good faith in a Court which "from other cause of a like nature" within the meaning of s. 14 was unable to entertain it. In our opinion the decision of this Court in *Ram Subhog Das* v. *Gobind Prasad* (1) and that of Sir Barnes Peacock, C.J.,

(1) I. L. R., 2 All. 622. (2) 6 W. R. 184.
(3) I. L. R., 10 Calc. 86.

and Mr. Justice Trevor in *Chunder Madhub Chuckerbutty* v. *Ram Coomar Chowdry* (1) are in point, although the latter decision was given on the former Act. We do not follow the decision of the Calcutta Court in *Deo Prosad Singh* v. *Partab Kairee* (2). In our opinion "other cause of a like nature" must mean some cause analogous to defect of jurisdiction. We see no analogy between a case where a suit was dismissed for defect of jurisdiction and a case like the first suit of this plaintiff, which was dismissed because he had not shown a liability in the defendants to him alone. In the plaintiffs' first suit there was nothing like a defect of jurisdiction. In every respect the Court had ample jurisdiction to hear and determine the suit. The reason why that suit failed was, as we have said, because the contract was to pay the partners, and not to pay one of them alone. We dismiss the appeal, and confirm the decree below with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

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February 24.

RAM DAYAL AND OTHERS (DEFENDANTS) *v.* DURGA SINGH AND OTHERS (PLAINTIFFS).*

Hindu Law—Joint Hindu family—Money decree against father alone for his personal debt—Attachment of joint family property—Suit by sons to set aside attachment.

Where in execution of a simple money decree obtained against the father only in a joint Hindu family in respect of a bond debt incurred by him personally, the decree-holders attached the whole of the joint family property, and before sale in execution took place, the sons of the judgment-debtor objected to the attachment under s. 278 of the Civil Procedure Code, and, the objection having been disallowed, sued for a declaration that they were entitled to a share in the property and for its release from attachment,—*held* that the plaintiffs were entitled to impeach the attachment upon the ground that it affected interests which the decree could not touch and which therefore could not be attached under it, and that they were in a position to ask to have those interests exempted from the threatened sale in execution.

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* First Appeal No. 72 of 1887 from a decree of Babu Abinash Chandar Banerji, Subordinate Judge of Aligarh, dated the 21st March 1887.

(1) 6 W. R. 184. (2) I. L. R., 10 Calc. 86.

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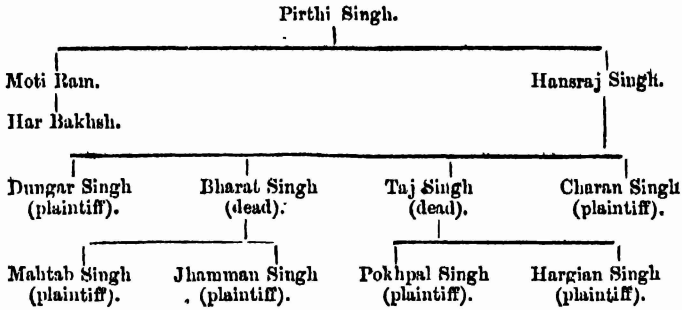
THE following genealogical table shows the relative positions of the plaintiffs in this case :—



The suit was instituted in the Court of the Subordinate Judge of Aligarh on the 12th March 1886. The plaintiffs, as will be seen from the above table, were the two surviving sons and the four grandsons of Hansraj, and the first defendant was Hansraj Singh, who died since the litigation commenced, and the second and third defendants, Ram Dayal and Behari Lal, by a guardian *ad litem*, the minor sons of one Todar Mal, deceased, the obligee of a single bond of the 20th August 1873 for Rs. 10,000, of which Hansraj Singh was the obligor. This bond was put in suit by these minors through a guardian, and on the 1st October 1880, they obtained a simple money decree against Hansraj Singh. In execution thereof they attached—

(1) 3 biswas 6 biswansis 13¼ kachwansis of mauza Gharbara.

(2) ⅓ of 5 biswas of mauza Mour.

(3) 10 biswas of mauza Khanadiya.

To this attachment the present plaintiffs preferred objections under s. 278 of the Civil Procedure Code, but they were disallowed. Hence the present suit for a declaration that out of the properties attached they were entitled to a four-fifths share and to its release from attachment and sale, and they further prayed that such four-fifths share might be partitioned, and that they might be given possession of the same.

They based this claim upon the allegations that the property was ancestral and joint, that Hansraj Singh and his sons and grandsons acquired a right in such ancestral and joint property from the dates of their respective births, and "that under the Hindu Law, one-fifth of the whole property belongs to Hansraj Singh, and the rest four-fifths to the plaintiffs, whereof the plaintiffs are in possession."

The third paragraph of the plaint stated "that under the Hindu law, the plaintiffs are entitled to compel Hansraj Singh to partition their shares of which they can take separate possession, but the defendants, second party, have attached in execution of their decree for a simple debt, transferred by this Court to the Revenue Court of the district for sale of the property, the whole property, as the property of Hansraj Singh, judgment-debtor, and have advertised it for sale; that the joint ancestral property is not at all liable for the satisfaction of a simple debt like this; and that especially the shares of the plaintiffs cannot by any means be attached and sold in execution of a decree for a simple debt. Moreover, the decree was contracted without any necessity whatever, for unlawful and immoral purposes. But even if it be assumed that the debt was not incurred without necessity, still Hansraj Singh, judgment-debtor, alone is personally responsible for its payment." The suit of the plaintiffs was thus directed against the attachment that had been maintained on the whole property by the establishment of their right to four-fifths of such property, as provided in s. 283 of the Civil Procedure Code, and it rested on two grounds: first, that the decree against Hansraj Singh was personal to him and affected him alone; secondly, that the debt to which it related was contracted without necessity and for unlawful and immoral purposes.

The Court of first instance (Subordinate Judge of Aligarh) decreed the suit. The defendants appealed to the High Court.

Mr. *G. E. A. Ross* and the Hon. Pandit *Ajudhia Nath*, for the appellants.

Mr. *Abdul Majid* and Pandit *Bishambhar Nath*, for the respondents.

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STRAIGHT, J.—In the case of *Beni Madho* v. *Basdeo Patak* (1) I went at length into the more recent decision of their Lordships of the Privy Council bearing on the points which arise in the present appeal, and stated what appeared to me to be the outcome of these decisions. The case of *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kouden* (2) is most apposite to the suit out of which this appeal has arisen, the only difference being that in that case, despite the objections of the son to the attachment, the sale went on, and the decree-holder purchased the property, while here there is an attachment of the whole property, but as yet no sale has taken place.

Upon the authority of that ruling it seems to me that if in the present case the sale had taken place, and the decree-holder had purchased the whole property, and had obtained a sale certificate for the whole, it must have been held that the whole had passed to the purchaser, unless the plaintiff could have shown that nothing but the interest of Hansraj Singh was sold, or that, if the whole purported to have passed, their interests were exempted by reason of the debt on which the decree was founded being one which they were not bound to pay, because it had been contracted for immoral or illegal purposes.

The first question for consideration then is whether the bond of the 20th August 1873, and the decree founded upon it, justified an attachment of anything more than the interests of the judgment-debtor, Hansraj Singh. I have read both documents, and I have no doubt that the decree was a simple money decree purely personal to Hansraj Singh, and for a debt incurred by him personally. Under such circumstances, I think the plaintiffs were entitled to come into Court to impeach the attachment upon the ground that it affected interests which the decree could not touch, and which therefore could not be attached under it, and that they were in a position to ask to have their interests exempted from the threatened sale in execution. Having established this much, I agree with the learned Subordinate Judge that the question of the immorality of the debt did not arise, and in adopting this view, while adhering to what I

(1) *Ante*, p. 99. (2) L. R., 16 I. A. 1.

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said in *Beni Madho* v. *Basdeo Palak* (1), I am glad to think that it is also in accordance with the opinion expressed by the learned Chief Justice in *Balbir Singh* v. *Ajudhia Prasad* (2). I may add that the plaintiffs and their advisers have no one but themselves to blame. It must have been perfectly well known to them when they brought their suit in 1880 against Hansraj Singh, that he was a member of a joint Hindu family along with his sons and grandsons, and as they were suing him for a simple bond debt, if they wanted to bind his coparceners, they should have arrayed them as defendants, and obtained a decree against them.

I dismiss this appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Mahmood.

1889 *July* 23.

SARAT CHANDRA CHAKARBATI (PETITIONER) v. FORMAN AND ANOTHER (OPPOSITE PARTY).*

Minor—Custody—Guardianship—Act IX of 1861, *ss.* 1, 3, 4—*Jurisdiction—Civil Procedure Code, s.* 17—*Act IX of* 1875 (*Majority Act*), *s.* 3—*Discretion of Court under Act IX of* 1861, *s.* 3.

An application was made to the District Judge of Allahabad, under s. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants, at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore.

Held that, under ss. 1, 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad, where the cause of action arose; and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application.

Under s. 3 of Act IX of 1875 (the Indian Majority Act) a person under the age of eighteen is a minor within the meaning of Act IX of 1861.

No such restriction as is imposed by s. 27 of Act XL of 1858, prohibiting the appointment of a guardian of any minor whose father is living and is not a minor,

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* First Appeal No. 77 of 1888 from an order of W. G. Jackson, Esq., District Judge of Allahabad, dated the 21st February 1888.

(1) *Ante*, p. 99. (2) I. L. R., 9 All. 142.

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applies to persons applying under s. 1 of Act IX of 1861. Where the father of a minor was old and unable to work from age and weakness, and the minor's elder brother had been maintaining and educating the minor at his own expense,—*held* that, under the circumstances, the brother was competent to apply under s. 1 of Act IX of 1861, and to ask for a certificate of guardianship.

The words in s. 3 of Act IX of 1861, "and thereupon proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor" confer on the Court an absolute discretion to make an order as to custody or guardianship, or to refrain from making such an order where the circumstances do not call for such an order being made.

Where a minor Hindu over the age of sixteen, who had embraced Christianity and left the house of his elder brother by whom he had been maintained and brought up, appeared to be well able to take care of and provide for himself, and preferred to be left as he was, and had sufficient mental capacity to judge what was best for himself, the Court refused to make any order upon an application by the brother for his custody and guardianship.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Babu *Dwarka Nath Banerji* and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. *J. E. Howard*, Mr. *C. Ross Alston* and Mr. *J. Simeon*, for the respondents.

STRAIGHT, J.—This is an appeal from an order of the officiating District Judge of Allahabad dated 21st February 1888, dismissing an application of the appellant, one Sarat Chandra Chakarbati, preferred under Act IX of 1861, for the custody of his minor brother Satya Saran Chakarbati. The connection of the respondents with the matter is stated thus in the petition of the appellant:—"That the respondents being connected with the Jumna Mission School and having got their influence over the said minor, on the 25th December 1887, without the knowledge or consent of the petitioner or other relatives of the said Satya Saran, baptised the said Satya Saran in the Jumna Mission Church, and the said petitioner became cognizant of this fact on the 26th December 1887. That on the 29th December 1887, the said Satya Saran, having intimated by letter to the said defendants his intention to renounce the Christian religion, the said defendants came to the

petitioner's home and demanded from the petitioner the surrender of the said Satya Saran, which the petitioner refused to do. That on the 30th December 1887 the defendants without the knowledge or consent of the petitioner improperly removed the said Satya Saran from the guardianship of the petitioner, and are now keeping him in their custody without any legal authority or permission from the petitioner to do so."

The respondents in reply to these allegations denied the charges contained therein and that the minor Satya Saran was in their custody or possession, and further asserted that the minor had left his home because his ill-treatment there drove him from it.

The learned Judge disposed of the application upon the following ground :—" The application is for the custody of the minor, and in order to succeed, assuming applicant to be otherwise entitled to the relief he seeks, it was necessary for him to show that the boy was in the custody of the respondents and within the jurisdiction of the Court. This is clearly not the case. He is now at Lahore beyond the jurisdiction both of this Court and of the High Court to which it is subordinate, and it does not appear in whose custody he is, or in fact whether there is any custody at all in the matter. The assistance, pecuniary and otherwise, given by the present respondents does not give the Court jurisdiction. The application is dismissed, but seeing that petitioner had sufficient grounds for believing that the minor was under the respondents' control, respondents will pay their own costs."

The appeal first came before my brother Mahmood and myself for hearing upon Friday the 22nd March last, and upon that date we had an able and elaborate argument addressed to us for the appellant by Mr. *Banerji*, his learned counsel, who was followed by Mr. *Alston* on behalf of the respondents. At the close of the day's proceedings we intimated to Mr. *Alston* that his clients would, looking to all the facts disclosed before us, act wisely and in their own best interests if they took steps to produce the minor before us on Friday the 5th April, to which date we adjourned the further hearing. Upon that day the minor was not in attendance, but an

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affidavit was filed by one of the respondents, Mr. Forman, to the effect that Satya Saran was at Saháranpur within our jurisdiction, but that he refused to come to this Court. We therefore caused a summons to issue to Satya Saran, and in obedience thereto he, on Thursday April 18th, appeared before us and we had an opportunity of seeing him, and examining him on oath as well as his brother, the petitioner-appellant. I may add that upon the same date an affidavit of Satya Saran was filed, which in substance came to this, that he objected to return to his brother's house and custody for fear of ill-treatment. At the close of that day's proceedings we took time to consider our judgment, making no order as to temporary custody or guardianship of the minor on his undertaking to appear before us when called upon to do so. I now proceed to dispose of the appeal.

The four questions that arise are, first, was the Judge right in dismissing the appellant's petition for want of jurisdiction? second, if the Judge had jurisdiction, was Satya Saran a minor within the meaning of Act IX of 1861? third, if the Judge had jurisdiction, was the appellant a person who could properly apply for the custody and guardianship of the minor? fourth, what is the nature of the powers conferred by s. 3 of Act IX of 1861, and what is the proper order to be made in the case?

As to the first question, namely, that of jurisdiction, I am very clearly of opinion that the learned Judge below was wrong. By s. 1 of Act IX of 1861 it is provided that an application made thereunder is to be addressed "to the principal civil Court of original jurisdiction in the district, by which such application, if preferred in the form of a regular suit, would be cognizable," and by s. 4 it is declared that "in cases instituted under this Act the Court shall be guided by the procedure prescribed in the Civil Procedure Code in so far as the same shall be applicable and material."

The rules therefore of Act XIV of 1882 regulating the "place of suing" must be looked to for guidance. From the terms of the petition filed by the appellant it is clear that the grounds upon which he claimed the intervention of the Court were, that his

brother Satya Saran had by the acts or with the connivance and assistance, pecuniary and otherwise, of the respondents been removed from his custody and guardianship in Allahabad, in other words, that the respondents by what they had done in Allahabad had either removed Satya Saran or caused him to be removed and had there infringed the right of the appellant to his minor brother's custody and guardianship. The infringement of such right would, in my opinion, be equivalent to the giving a cause of action for a suit, and in that view of the matter s. 17 of Act XIV of 1882 (Civil Procedure Code) would be the guide, and the proceedings under Act IX of 1861 would be entertainable in the Court of the Judge of Allahabad within the local limits of which the acts of the respondents whereof the appellant complained were charged to have been done. I do not think that the fact that at the time of the trial in the Judge's Court the minor was out of the jurisdiction is of any material importance, if upon the facts stated in the petition it appeared that the defendants were responsible for his removal. As I pointed out at the hearing, to place so narrow a construction upon the statute would render it practically inoperative, and enable persons bent upon defeating it by successive removals of the person of a minor from one place to another to deprive any Court of jurisdiction. Apart from the terms of s. 17 of the Civil Procedure Code, if the exigencies of the case required it, I should have no hesitation in holding that the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer under Act IX of 1861 had full power to entertain and deal with the application of the appellant. The Judge was, therefore, in my opinion wrong, and if there are materials on the record sufficient to enable us to do so, we must, reversing his order, proceed to deal with the matter on the merits.

The second question is, is Satya Saran a minor within the meaning of Act IX of 1861? It is not denied that at the present moment he is under the age of 18 years, the assertion for the appellant being that he is not yet 16 years of age, while he himself alleges that he is above that age, and I have little doubt that at the time

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the application was made in the Judge's Court up to end of 1887 and early in 1888 he was under 16. But having seen him and heard his statement upon oath, I am disposed to think that he is now quite 16 and I should say probably 17. He is a strong well developed youth, and from the fact that as far back as March 1887, he passed the University Entrance Examination and speaks English well, it is obvious that his intellectual capacity is considerable. By s. 26 of Act XL of 1858 it is declared that "for the purposes of this Act, every person shall be held to be a minor, who has not attained the age of eighteen years." That statute made provision for the care of the persons and property of minors having property, and they were made subject to the jurisdiction of the Civil Court. But Act IX of 1861, "to amend the law relating to minors," in no way abrogated Act XL of 1858, but was a sort of supplement to it, and has to be read along with it. That last mentioned Act contains no section qualifying or altering s. 26 of the former statute. But it appears to me that the law to which we must now look is that to be found in Act IX of 1875, by which with certain exceptions the age of majority is declared to be 18 years. I think therefore that Satya Saran Chakarbati was and is a minor within the meaning of Act IX of 1861. The third question is, is the appellant a person who could properly apply for the custody and guardianship of the minor? For the respondents our attention was called to s. 27 of Act XL of 1858, which says "nothing in this Act shall authorize the appointment of a guardian of the person of any minor whose father is living and is not a minor;" and it was argued that as Jaudub Chandra Chakarbati, the father of the appellant and of Satya Saran, the minor, is alive, this was a direct prohibition to the prayer of the appellant's petition being granted.

However that may be in reference to Act XL of 1858 if it stood alone, no such restriction is to be found in Act IX of 1861, and "any relative or friend of a minor, who may desire to prefer any claim in respect of the custody or guardianship of a minor may make an application." The petitioner in the present case is the elderbrother of the minor, who, until December 1887, lived with the petitioner

and his other brother as the member of a joint Hindu family. His father, Jaudub Chandra Chakarbati, is an old man, unable to work from age and weakness, and has gone to Benares to end his days there. The petitioner is employed in the Locomotive Department Clerks' branch of the East Indian Railway, and upon his shoulders has fallen the expense of maintaining and educating the minor, and admittedly he has been doing so. I think under these circumstances, and looking to the terms of s. 1 of Act IX of 1861, that he was competent to put in his petition in the present case and to ask for a certificate of guardianship. Then remains the fourth and last question, namely, what is the nature of the powers conferred by s. 3 of Act IX of 1861 and what is the proper order to be made in the case? I may premise by saying that I have carefully read and considered the evidence of the respondents given in the Court below, and that it leaves no doubt upon my mind that they individually and jointly, if they did not actually instigate him to do so, did countenance and assist the minor in leaving his brother's roof and withdrawing himself from his custody and guardianship. However excellent the motives that animated them, I cannot but regard such a proceeding on their parts as unwise and calculated under other circumstances than fortunately exist here, to cause very grave difficulties and to provoke controversies and mischief, which it should be the object of all of us to avoid, and which happily have not arisen in the present case.

Then I have to consider what in regard to the language of Act IX of 1861 is the proper order to be made? In dealing with this question the terms of the section must be looked at. It says "and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor." It might be argued, and indeed it has been suggested by my brother Mahmood, that, under the language of the section, the Court is bound in every case, where it has a minor before it, irrespective of his age and all other circumstances of the case to make some order as to his custody and guardianship. But upon careful consideration of this view I am unable to adopt it, and I think that to put such a construction upon the section would at times place the Courts in positions

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of great difficulty. For it must be remembered that now we are treating the question of the bare custody and guardianship of a minor possessed of no property. Could it be seriously said that if a person had applied for custody and guardianship of a minor and the Court considered such person unfit to have a certificate, such Court was bound to look about and find some other person, though no one had come forward? I could not adopt such a view for a moment. In my opinion the words I have quoted confer an absolute discretion to make an order as to custody or guardianship, or to refrain from making such an order where the circumstances of the case do not call for such an order being made. This leads me to examine the circumstances of this case and the materials we have before us for the purpose of guiding us in the exercise of that discretion. I have already stated what the personal appearance and apparent intellectual capacity of the minor was whom we examined in this Court, and I do not think for the purpose of throwing light upon the matter that I can do better than read at length his deposition taken before us. It was made in excellent English and with great ease and self-possession.

"My name is Satya Saran Chakarbati. Sarat Chandra is my elder brother. He is my own brother. He is about nine or ten years older than I am. I came to Allahabad in 1882 from Lahore. My brother was then employed in Lahore in a merchant's office as a clerk, and left employment, and was going to Calcutta to take up some trade, when we all halted at Allahabad, where he was fortunate enough to get some work, and so we settled here. I came with him. I was born at Lahore, and was bred up to my ninth or tenth year at Lahore. My father had given up his work, and I was living with my brother. He took care of my education during all that time: I mean my brother took care of my education. In 1882, when we came from Lahore, my father came along with us. In 1882 I took up residence in Allahabad with my brother. My brother Sarat Chandra is the managing member of the family. I had no ill-treatment from him during that period when I was under his care. I was very young and, as a matter of course, he used to beat me and my younger brothers. It was for our good. He never tried

to poison me, he never wished to put an end to my life in any other manner. He gave me no religious instruction. It was after my baptism that I first left the house. My baptism took place on the 25th December 1887, and I left my house on the 30th December. I fear being badly hurt if I go to my brother. He might beat me or keep me locked up or do anything else of the sort. My mother is living with my brother: she will not do me any harm, she is a loving mother. I would not have left the house but for my brother. She could prevent Sarat Chandra from harming me, but he will not hear her. The feeling that they (the members of my family) have towards me, I entertain towards them. I would like very much to live in Allahabad, but not live with them, unless they be Christians. As my brother has said he does not care for caste, but cares more for me, I think he would not count it a great loss to turn Christian and leave his lodging in the city and take up his residence in the mission compound. I can make up my own arrangement for my food. I can be employed somewhere as a private teacher and go on with my studies. If my brother does not support, I can still pay my own expenses. The exact amount that I should require for such expenses is Rs. 10, three rupees being for my college fees and the balance for my food and lodging. I can get that sum without the aid of my brother. I am not willing to go back to my brother.

"*Q.*—You have heard what your brother said just now, your old mother is at home, she is crying her eyes out, and your brother says he will not interfere with your religion. What objection have you then to go back to him?

"*A.*—Since I am a Christian I must have my neighbours Christians. I cannot live with my family because they are not Christians.

"*Q.*—Have you any real objection to being made over to your brother when we make it impossible for him to harm you?

"*A.*—I think I shall be more happy if I live away; as they are my well-wishers, why should they object if I live away when by so doing I shall be happy?

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"The affidavit was prepared by Mr. *Alston*; I gave him instructions. The things were all of my own description; I had not written them down. I first mentioned them to Mr. Lucas. I first saw that affidavit this morning and it was read over to me by Mr. *Alston*. I found what I told Mr. Lucas in the affidavit. There are some things in the affidavit which Mr. Lucas did not show me. I have thought a good deal upon questions of religion and morality and have come to the conclusion that all my ancestors ever since the beginning of things were wrong.

"*Mahmood, J.*—You have often thought upon questions of morality?

"*A.*—What do you mean by morality?

"*Mahmood, J.*—I mean good conduct or ethics.

"*A.*—I do not know the meaning of the word 'ethics.' I have undertaken to change my religion without consulting my brother because so my Lord says. I think I know enough of the Hindu religion and Christianity to distinguish between the two. I was about 15 years when I was baptized."

The impression left upon my mind by personal observation of the minor and by his evidence was and is that he is well able to take care of himself, and that from the sources provided by his own successful studies he is in a position to provide for himself and to defray the expenses incident to the further prosecution of those studies. I think also that a point not to be lost sight of is that he personally prefers to be left as he is, and that he has ample mental capacity and power of discrimination to make the choice and to judge what is best and happiest for himself. I have already said that, in my opinion, the minor is above the age of 16 years, that is to say, two years beyond the point of age at which s. 361 of the Penal Code provides for the protection of male minors from kidnapping.

This section of course only shows the extent to which the Legislature has thought it necessary to throw the protection of the criminal law over male minors or to restrict their personal liberty

of action, and I have only referred to it by way of analogy for the purpose of seeing at what point of age we, in dealing with a case like the present, may in exercising our discretion take into account the fact that the minor has passed the age up to which the criminal law treats him as having no discretion of his own in regard to his personal custody and guardianship. Enough, then, I think, has been said to show why, under the circumstances of this case, I do not feel called upon to make any order for the custody and guardianship of Satya Saran. I may here observe that the appellant-petitioner in his deposition in this Court was asked, "If he (the minor) comes back to your house, are you willing to let him remain with you without any interference with his wishes about his religion?" to which his answer was "Certainly, I am willing;" and at an earlier stage of his evidence he said "I do not care whether my neighbours would approve my doing so or not, or whether my caste-men will like it or not, but I am willing to take him back into my family and live with him and keep him."

The petitioner himself was brought up at a mission school, and he not only countenanced Satya Saran, the minor, going to the Jumna Mission School, but also another of his brothers, and it was clear to my mind from his tone and demeanour, while giving his evidence before us, that his real objection to the action of the respondents did not seriously rest on religious grounds, but was mainly concerned with his having been induced to leave the joint family house and circle, and to withdraw himself from a position that would, if continued, hereafter require him to contribute towards the common family fund from his earnings. For the preceding reasons I dismiss the appeal, but the case is not one in which I feel called upon to make any order as to costs.

MAHMOOD, J.—The decision of this case has been delayed partly because of the consent of my brother Straight in reserving judgment to enable me to consider the exact interpretation to be placed upon s. 3 of Act IX of 1861, as to whether or not in cases of this character where custody of a minor is claimed, this Court or indeed any Court to which such application has been made, is bound

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absolutely to make an order one way or the other as to the minor's custody as distinguished from refraining to make any such order. The question has been matter of much anxious consideration by me, but I have come to the conclusion, in concurrence with my brother Straight's view, that the wording of the section as it occurs there, "and shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor" does not necessitate a Court of justice in every case to deliver a minor to the custody of any person, and that, as my brother Straight has stated, the wording is broad enough to enable us to hold that the Court may hold its hand and desist from making any order as to the custody of a minor in respect of whose custody under the circumstances of the case, such as it may be, no such order is necessary.

It is therefore clear that in this case this Court as a Court of appeal from the order of the learned District Judge has jurisdiction within the law to refrain from making any order as to the delivery of the minor to the custody of the petitioner or to the custody of any other person.

Having thus expressed my concurrence with my brother Straight upon this point, which as I have said, seems to me to be the prominent point in the case, and one of considerable importance, as it would involve the question whether the custody of the minor was to be made over to his brother, the petitioner-appellant, or to the Rev. Mr. Forman, one of the respondents, or to the Rev. Mr. Lucas, another of the respondents, I need only go further so far as the legal aspect of the case requires after the disposal of this question.

My brother Straight has stated that under the definition given in s. 26 of Act XL of 1858, which because it is *in pari materia* can be read with the Minors Amendment Act (IX of 1861), the age of majority would be eighteen years, and my brother has also said that the minor Satya Saran is below that age and as such a minor. My learned brother has also called my attention in his judgment to the applicability of the Indian Majority Act, IX of 1875, which again defines accurately what the age of majority is. Even with reference to the definition contained in that enactment, the minor

Satya Saran is a minor, and as such subject to such rules of law as to the custody of minors as may be applicable.

It would be a waste of time to dwell upon the circumstance that before the passing of the enactments to which I have referred the law in British India stood as it did before the accession of the British rule, that is to say, in the case of Hindus the Hindu law was applicable and in the case of the Muhammadans the Muhammadan law was applicable, in respect both of contractual capacity and other matters independent of contract. That undoubtedly was the law, and to this day our Contract Act (IX of 1872) in s. 11 still refers to the personal contractual capacity of the contracting party for purposes of age, as the age of such capacity. Now I have said enough to show that the present minor had no capacity to enter into any contract, because then it would be necessary to refer to the provisions of the Indian Majority Act (IX of 1875) to indicate what the age of his contractual capacity would be, and that age, as pointed out, would be the age of 18 which the minor has not yet attained. But the question here is of a vaster description than any question of contractual capacity. What we are called upon to consider is, whether or not under the terms of s. 3 of Act IX of 1861, we are to make such decree or order as this Court can make forcing the minor Satya Saran to go into a custody which he declines to enter into, subject himself to a guardianship which he abbors and detests, and to be subjected to such penalties as the disobedience of our mandate would naturally involve under the law. This is the question which we are called upon to consider, and the circumstances of the case have been so fully stated by my learned brother Straight that it would be repeating what he has said if I were to refer to them further. It is clear from them that the boy Satya Saran is not an infant in arms, nor a youth without understanding. He is not an illiterate or an ignorant boy, but has prosecuted his studies in a language not his own and has succeeded to the extent of obtaining such reward as academical success in his position can achieve. By dint of his academical success he had won a scholarship amounting to Rs. 5 a month, and is now in a position to be able to support

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himself and to be independent both of the petitioner, his elder brother, and the rest of his family for purposes of ordinary sustenance.

Even under circumstances where a precocious intellect would enable a child to achieve academical rewards sufficient to support him or to earn his livelihood otherwise, I should be willing to apply the provisions of s. 3 of Act IX of 1861, and in the exercise of the discretion which a Court has, to force the child to go into the custody of his natural guardians and to subject himself to their control and direction. I would be the more willing to make such an order, because in my opinion both the practice in English Courts and in this country fully justifies us to make such an order, when the reason why the legal custody has been relinquished by the child is either at the instigation or at the advice of persons who are not his legal guardians or legal advisers as to his temporal or spiritual welfare.

But such is not the case here. What I have to consider is, whether this boy is of such an age as to require me in the exercise of such jurisdiction as this Court has, to restrict his personal liberty by an order which in its nature at least is not dissimilar to an order passed by a criminal Court practically making him over bodily to the custody of his brother. This is the point which I have to consider. Now my brother Straight has stated that Act IX of 1875 is the Act to which we should refer for the purpose of deciding the question as to the minority or majority of the boy Satya Saran; and my learned brother has also introduced what I consider a very cogent and intelligible distinction as to the age at which the personal desire of the child ceases to have any effect, and before which age his removal from one custody to another would amount to the offence of kidnapping. He has also said that here Satya Saran had passed the age of being dealt with as if he was incapable of making his own choice as to the custody or guardianship under which he chooses to live, because he is admittedly above the age of fourteen.

In passing the Indian Majority Act, IX of 1875, the Legislature had a most delicate matter to consider, because it was, as is obvious

not only from the preamble, but from the rest of the enactment, that the Legislature was then desirous to provide as much as it could against interfering with what are called native personal laws, namely, the Hindu and Muhammadan law of nonage and majority. It is significant that in s. 2 of that enactment express provision is made to the effect that that enactment shall not affect the capacity of any person to act in matters of marriage, dower, divorce and adoption; and the native law was to be left untouched as it was before the passing of the statute. So also is clause (*b*), which is one upon which I wish to lay some emphasis, and that clause says that nothing contained in the statute is to affect "the religion or the religious rites and usages of any class of Her Majesty's subjects in India." It is clear from that provision that the age of majority was intended to be non-applicable to matters of religion, and that the provision was made in deference to the religious sentiments and prejudices of Her Majesty's Indian subjects here. But when that clause is to be interpreted, surely it is not to be interpreted entirely in favour of the Hindus and Muhammadans, but also in favour of persons other than Hindus and Muhammadans, such as Buddhists and Christians.

The solitary ground upon which this minor Satya Saran left his parental roof, or rather the house of his elder brother, was the change of religion. For such a change of religion the law has provided no age of majority. The whole law is silent on that point, and if there is any indication it is to be found in the clause which I have just cited, namely, that the Majority Act does not apply to matters relating to religion. In the present case, if after the examination which we made of the boy Satya Saran I had arrived at the view that he was not of the age of discretion as distinguished from the age of legal majority, if I had felt that he could not take care of himself, if I could hold upon the evidence that he had been so far misled or seduced into the way of thought as to religion by reason of any fraud or any other improper method such as would present evidence of his being incapable of understanding what he was doing, I should have with due respect to my learned brother differed from him and passed

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an order that the boy should be bodily made over to his brother the petitioner and remain under his custody under such terms as the Hindu law of guardianship prescribes. My learned brother has pointed out that such is not the case, and neither the Legislature nor any rule of justice, equity or good conscience which would otherwise be applicable to such matters, requires us to force this grown up boy to be made over to the custody of his brother whose kindness he does not admit, whose religion he abhors, whose way of thought does not suit him, and practically to make this Act an Act more in the nature of a criminal statute directing compulsory custody instead of what the law according to the interpretation of my brother Straight and myself contemplates, namely, jurisdiction only in such cases where discretion in the minor is wanting and the child is of such an age as to be dealt with by persons other than those who have taken him away from proper guardianship.

In the present case I have no doubt that in a country like India, where not only numerous religious customs prevail, but also where the missionary endeavours to convert the Hindu and the Muhammadan population to the religion which Christianity prescribes, are carried upon a considerable scale, questions of this character arise, and it is not a matter of infrequent occurrence that it devolves upon the Court to have to deal with cases and circumstances where the strong hand of the law is asked to be employed to prevent the excess of the one party or the excess of the other in crossing the religious straight line which distinguishes right from wrong in the legal sense which the Courts of justice have been established to enforce. The duty of the Courts under these circumstances is very clear. They have got to see what the law directs; they would not interfere unless they found that the child is, by reason either of want of education or of other influences which have been brought to bear upon him in the ordinary course of life, in a position not to understand what he is doing. Parents, as in this case the mother, may weep, because their son has become a Christian; so in other cases great misery may arise in the shape of grief to the nearest relatives of the boy. But the law provides no remedy for

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such sorrow, because if it did it would be taking away the principle of human liberty and religious toleration under every civilized form of government.

I have considered it necessary to say what I have said not because I thought that any word that had fallen from my learned brother Straight required any addition, but because it should be clear that neither my brother nor I have decided this case upon any ground other than the strict requirements of the law, and that we have desisted from making any order as to the custody, because with reference to the circumstances of Satya Saran, his age, his intellectual capability of looking after himself and maintaining himself, and with reference to the other circumstances of the case, we are not called upon to make any order under s. 3 of Act IX of 1861. My learned brother has already pointed out how the petitioner-appellant had *locus standi* to maintain the petition; how the District Judge had jurisdiction to entertain the case; how we had jurisdiction to pass any order we like; and he has also stated his reasons why in this case no interference is necessary. I agree in dismissing the appeal without costs.

Appeal dismissed.

1888 *August* 3.

Before Mr. Justice Stright and Mr. Justice Mahmood.

ABBAS ALI (PLAINTIFF) *v.* MAYA RAM AND OTHERS (DEFENDANTS)*

Pre-emption—Muhammadan Law—Shias—Property owned by more than two co-sharers.

The prevalent doctrine of the Muhammadan Law governing the Shia sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. *Shaikh Daim* v. *Asooka Beebee* (1) and *Tafazzul Husain* v. *Hadi Hasan* (2) dissented from.

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Mr. *Amiruddin*, for the appellant.

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* Second Appeal No. 158 of 1887 from a decree of J. C Leupolt, Esq., District Judge of Moradabad, dated the 8th November 1886, confirming a decree of Maulvi Mazhar Hasan, Munsif of Nagina, dated the 25th March 1886.

(1) N.-W. P. H. C. Rep., 1870, p. 360. (2) Weekly Notes, 1886, p 139.

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Pandit *Sundar Lal*, for the respondent.

MAHMOOD, J.—This is an appeal which has arisen out of a suit for pre-emption relating to a sale, dated the 22nd March 1885, in which the vendors were Hasan Ali Khan, Nadir Ali and Nijabat Ali, with whom the plaintiff-appellant, Sayyid Abbas Ali, was a coparcener in the property sold. There is no doubt that the property in suit was a *Sarai* and land appertaining to it, and that the plaintiff's share in it, whatever it may have been, would, under the Muhammadan law of the Sunni school, entitle him to maintain a suit for enforcement of the pre-emptive right. Nor is there any doubt that the purchasers being Hindus would be governed by the law to which the pre-emptor and the vendors were subject in connection with matters of pre-emption. This point was fully considered and unanimously agreed upon in the Full Bench case of *Gobind Dayal* v. *Inayat Ullah* (1), which in principle also governs this case, although the vendors and pre-emptor are Shias and the purchasers Hindus. If it was necessary to go further into the matter, I might point out that the Shia school of the Muhammadan law, taking a much less liberal view of natural or religious distinctions in connection with pre-emption than the rules adopted by the Sunni school of law, goes the length of saying (Baillie's Digest of the Imameea Law, page 180) that, "The right of *Shoofa* is established in favour of an infidel against a purchaser of his own persuasion, but not against a *Mooslim*, even though he should have purchased from a *Zimmee* or infidel subject. But it is established in favour of a *Mooslim* against a *Mooslim* and an infidel." I have mentioned this without in the smallest degree laying down that a question of this kind would necessarily be governed by the passage. It is enough to say that the Full Bench ruling of this Court has settled the point, and that the case must be governed by the Muhammadan law.

The question then is, which school of the Muhammadan law is to be applied to the case? Their Lordships of the Privy Council, so long ago as 1841, in the case of *Rajah Deedar Hossein* v. *Runee*

(1) I. L. R., 7 All., 775.

Zuhooroon Nissa (1) distinctly laid down the rule, in interpreting Regulation IV of 1793, which was worded in terms similar to those contained in s. 24 of the Bengal Civil Courts Act (VI of 1871) and the corresponding section of the present Civil Courts Act, that in the case of Shias, in matters regarding succession, inheritance, marriage and caste, and all religious usages and institutions, Muhammadan laws with respect to Muhammadans, and Hindu laws with respect to Hindus, are to be considered as the general rules by which Judges are to form their decisions, according to the true construction of which the Muhammadan law of each sect ought to prevail as to the litigants of that sect, and not the general or Sunni Muhammadan law (2).

This view is not only in full accord with the practice of this Court in connection with Shia litigants, but also proceeds upon the same principle as that whereby the Courts of British India have fully applied any particular school of Hindu law in cases in which the parties are governed by the particular school of Hindu law. I have therefore no doubt that the case is governed by the Shia law and not by the Sunni law, it having been found by the Courts below that the pre-emptor and vendors are both Shias.

Next comes the question, which I think is the main question in the case, namely, whether, under the circumstances, we are to follow a Division Bench ruling of this Court in *Shaikh Daim* v. *Musammat Asooha Beebee* (3), where Turner, Offg. C. J., and Turnbull, J. having considered the authorities of the Shia law, came to the conclusion that, inasmuch as there were indications of some difference of opinion existing in the Shia School of the Muhammadan law, as to whether the right of pre-emption exists in connection with property where there are more than two coparceners, therefore the absence of reported cases for the last fifty years showing that such doctrine was adopted, was a circumstance which required adopting the practice of the Court that such cases should be decided according to the Sunni law. I have considered that judgment with respect, especially because it refers to some authoritative names of books of

(1) 2 Moo. I. A. 441.
(2) See *Hayat-un-nissa* v. *Muhammad Ali Khan*, p. 290, *post*.
(3) N.-W. P. H. C. Rep., 1870, p. 360.

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the Shia law. The judgment of the learned Judges, however, does not contain the exact passages upon which they relied for holding that the Shia doctrine upon this point was open to such doubt as would not entitle the Court to decide which side of the view was to be accepted. Having taken time to consider the matter, I entertain no doubt that, although there do exist in the Shia law, as in any other system of law, certain variations and differences of opinion, the Shia law itself is very specific as to what is the prevalent doctrine in connection with the right of pre-emption. The book of the greatest importance as representing the Shia doctrine, is the *Sharaya-ul-Islam*, and it states that "when there is more than one claimant by right of pre-emption, opinions are divided as to the establishment of the right. According to one of these it is established absolutely, whatever be the number (of the claimants). According to another it is established with a plurality of partners when the claim is for land, but not when it is more than a single slave, and according to the third, it is not established with respect to anything when there is more than *one* (co-sharer). And *this* (last opinion) is the most prevalent."

Now this book, as I have already said, is a work of the greatest authority among the Shias; and next to it is the authority of *Tahrir-ul-Akkam*, which says:—"According to most of the doctors, the right of pre-emption is extinguished in the case of there being several *Shafis*, or claimants by right of pre-emption, and this doctrine is adopted by the modern lawyers."

The same principle has been laid down in the *Mafatih*, another book of the highest authority among the Shias, which says—"According to the prevalent doctrine there should be only one co-sharer (of the seller), and the right of pre emption is extinguished in the case of there being many part proprietors." These passages occur at page 447 of the Tagore Law Lectures for 1874, and there is no doubt that they lay down the real and accepted doctrine of the Shia law upon this particular point.

The ruling of this Court in *Shaikh Daim* v. *Asooha Beebee* (1) has been followed by another Division Bench of this Court in *Tafazzul*

(1) N.-W. P. H. C. Rep., 1870, p. 360.

Husain v. *Hadi Hasan* (1), and it has indeed been in consequence of the respect which is due to those two rulings that I have considered it necessary to go further than merely relying upon the expressions of difference of opinion which no doubt occur in the authorities of the Shia law; but so far as I am aware the prevalent doctrine is that the right of pre-emption does not exist in connection with the sale of property when more than two co-sharers or coparceners have rights in such property. The authoritative books of the Shia law themselves do not contain any discussion of the case in which there is more than one pre-emptor, in other words, there is no provision made for cases in which two or three or more pre-emptors claim pre-emption in respect of one and the same property in respect of one and the same sale. Upon this matter the Shia doctrine is vastly different from the Sunni doctrine. The best authority of the Sunni Muhammadan law is the *Fatawa-i-Alamgiri*, which was compiled by five hundred doctors of law under the directions of the Emperor Aurangzib, and contains chapters dealing with the question of rival pre-emptors, and those passages, sections and chapters lay down very intricate rules to deal with the complications which may arise in consequence of rival claimants. The *Sharaya-ul-Islam*, on the one hand, and the other authorities of the Shia law, on the other, are totally silent upon the matter; and I have no doubt that they do not deal with the doubtful Shia doctrine of law, because such doctrine in this respect has not been adopted, and we cannot resist the conclusion that we are obliged to adopt the prevalent doctrine that no right of pre-emption exists where more than two co-partners are the owners of the property to which the quarrel relates.

This being so, I am afraid it is necessary from my point of view to dissent from the two rulings of the Division Bench of this Court which I have mentioned, and in saying so, I would only add that most probably the exact authorities upon which the Shia law upon the matter proceeds were not duly placed before the learned Judges, and that in dealing with the matter on the principles of the Shia

(1) Weekly Notes, 1886, p. 189.

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doctrine, the learned Judges went too far in holding that, in the absence of authority in the reported cases among the Shias, the Sunni doctrine was to prevail.

Under these circumstances, I think that the admitted fact that the plaintiff Sayyid Abbas Ali was a co-parcener with three others, the defendants-vendors, in the property which was sold on the 22nd March 1885, is a circumstance upon which, under the principles of the very law which governs him, he is not entitled to maintain the claim for pre-emption. The suit was therefore, according to my view, rightly dismissed by the lower Courts, though not upon the exact grounds which I have stated.

I would therefore dismiss the appeal with costs.

STRAIGHT, J.—I entirely concur.

Appeal dismissed.

FULL BENCH.

1889 December 19.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

DEOKINANDAN (DEFENDANT) *v.* SRI RAM AND ANOTHER (PLAINTIFFS).

Pre-emption—Decree for pre-emption—Profits of property accruing between sale and decree becoming final.

In a suit for pre-emption based on the *wajib-ul-arz* of a village, the plaintiff pre-emptor did not ask for a declaration that he was entitled to be treated as a purchaser as from the date of the sale to the vendees, defendants, nor that he was entitled to the rents and profits as from the date of the sale, nor did he ask for mesne profits. The decree in his favour did not grant him any such relief. The *wajib-ul-arz* was silent as to whether the purchaser or the pre-emptor was entitled to the profits accruing subsequently to the date of the sale being avoided.

Held by the Full Bench that the decree merely avoided the sale and divested the original owners of all interest in the property as from the date when the decree became final by the payment, in accordance with its terms, by the pre-emptor of the pre-emptive price decreed, and vested in the pre-emptor the rights of ownership from that date, and his rights were not postponed until he had obtained possession of the property.

Held that the profits of the property which accrued between the date of the sale and the date when the pre-emptor, in accordance with the decree, paid the decreed

pre-emptive price, belonged not to the pre-emptor, nor to the original vendor, but to the original vendees.

Held by Mahmood, J, that the vendees-defendants were entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree.

Observations by Mahmood, J, upon the texts of the Muhammadan Law applicable to the case by way of analogy; upon the contention that there is a Hindu Law of pre-emption applicable to Hindus under s. 37 of the Bengal Civil Courts Act (XII of 1887); and upon the relation of the Muhammadan Law to cases in which pre-emption is claimed on the basis of contract or custom embodied in the *wajib-ul-arz* of a village.

THE facts of this case, which was a reference to the Full Bench, are fully stated in the judgments of Edge, C. J, and Mahmood, J.

The Hon. Pandit *Ajudhia Nath* and Munshi *Nawal Behari Bajpai*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

EDGE, C. J.—The plaintiffs in this case purchased certain bighas of land in a village. The defendant, who was a co-sharer in the village, brought a pre-emption suit in respect of that sale in which the plaintiffs were defendants, and, having established his right under the *wajib-ul-arz* of the village to pre-empt the property, got a decree. In that suit the present defendant did not ask for a declaration that he was entitled to be treated as a purchaser as from the date of the sale to the present plaintiffs, nor did he ask to have it declared that he was entitled to the rents and profits as from the date of the sale to the present plaintiffs, nor did he ask for mesne profits.

In the present suit, which was instituted in a revenue Court, the plaintiffs seek to recover the profits which accrued in respect of the property which was in question in the pre-emption suit for rabi 1290 fasli and kharif 1291 fasli. In the revenue Court the Deputy Collector dismissed the plaintiffs' suit, holding that the effect of the decree in the pre-emption suit was to vest the property in the present defendant as from the date of the purchase by the nowplaintiffs, and that the plaintiffs not being recorded co-sharers

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in the village at the date of the institution of the present suit, could not maintain this suit in the revenue Court.

On appeal the District Judge, holding that until a pre-emption decree is actually enforced by possession being obtained, the original vendee and not the pre-emptor is entitled to the profits of the property sold, and that under s. 93, cl. (*h*) of the Rent Act (XII of 1881) a person who was a recorded co-sharer when the profits accrued can sue for his share of the profits notwithstanding that at the time of suit he is no longer a recorded co-sharer, set the decree of the Deputy Collector aside and remanded the suit for trial on the merits. From that order of the District Judge this appeal has been brought.

The suit having gone on appeal to the District Judge, it is in my opinion immaterial now to consider whether or not the suit was instituted in the right Court, as the District Judge had under ss. 206, 207 and 208 of the Rent Act (XII of 1881), jurisdiction to dispose of it as therein provided, irrespective of the question as to whether or not it had been instituted in the right Court. It appears to me that the question as to whether or not the plaintiffs are entitled as against the defendant to the profits or any part of them claimed, is to be determined by the decree which the present defendant obtained in the pre-emption suit. If the pre-emption suit had been differently framed and a declaration asked for that the present defendant was entitled to the property as from the date of the sale to the nowplaintiffs, and such a declaration had been decreed, it is clear to my mind that the present suit could not be maintained so long as such a decree stood. I express no opinion as to whether such a decree could have been obtained. I must regard the decree in the nowdefendant's pre-emption suit as one which merely avoided the sale to the nowplaintiffs as from the date when that decree became final by the payment in accordance with the decree by the present defendant of the pre-emption price which was decreed, and as vesting in him the rights of ownership as from that date only.

From that date the nowplaintiffs, original vendees, became in law divested of all interest in the property, and consequently in my

opinion could not be entitled to any profits which subsequently accrued due, whether at that date or subsequently the successful pre-emptor obtained possession of the property.

To hold that the successful pre-emptor's rights would in such a case be postponed until he had obtained possession of the property, would be to vary or stultify the decree which had been made, and would encourage defeated defendants in a pre-emption suit to resist and obstruct as long as possible the execution of a decree which had been duly obtained.

It is to my mind unnecessary to consider what may or may not have been the rights of a pre-emptor and a displaced vendee respectively according to the Muhammadan Law of pre-emption, as what we would have to see in such a case in execution would be that the decree of our Courts was enforced, and the party obtaining his decree got the fruits of it. Besides, the right to pre-empt in this case depended on the contract or custom embodied in the *wajib-ul-arz* and not upon the Muhammadan Law of pre-emption.

In my opinion, the case as to the profits which accrued between the date of the sale and the date when the present defendant in accordance with the decree paid the decreed pre-emption price stands thus. The vendor having parted with his interest by the sale could not be entitled to those profits. The decree did not entitle the pre-emptor to those profits. It follows that the original vendees must in this case be the persons who are entitled to them.

For reasons which differ as I have indicated from those of the District Judge, I am of opinion that this case was properly remanded and that this appeal should be dismissed.

I would also order that costs here and below should abide the event.

STRAIGHT, J.—I am of the same opinion.

BRODHURST, J.—I concur.

TYRRELL, J.—I am of the same opinion.

MAHMOOD, J.—I understand the facts of this case to be the following. On the 4th of January 1883, one Radha Ballab exe-

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cuted a sale whereby he conveyed his share in certain zamíndári estate to Sri Ram and Chet Ram, and the sale-deed was registered on the 5th of January 1883.

On the 6th of March 1883, Deokinandan defendant-appellant being a co-sharer in the estate of which a portion was sold as above-mentioned, sued to enforce his right of pre-emption under the *wajib-ul-arz* of the village. The clause relating to the right of pre-emption is in the following words in that document:—

" دفعہ ۱۸ ذکر إنتقال حقیت و حق شفع هر ایک حصہدار کو اپنے
اپنے حق و حصہ کے إنتقال کرنے کا اختیار هی مگر اول اپنے بهائی بهتیجوں کے
هاتهہ جو حصہدار هوں اور بصورت إنکار أنکے دیگر مالکان تهوک کے پاس
بعدہ مالکان تهوک ثانی کے هاتهہ اور جو وہ بهی نہ لینگے تو جسکے پاس
چاهیگا منتقل کریگا — اور اگر کمی بیشی قیمت پر باهم بائع شفیع کے تکرار
پیش آویگی تو دیهات ملحقہ کی قیمت کے مطابق فیصلہ کیا جاویگا "

Now these are Hindustani words, and as they are words of my own language I will undertake to translate them into English as literally as possible in the following words:—

" Every sharer has the power to alienate his share, but first to the hands of his brother and nephews who may be sharers, and in case of their refusal to other owners of the *thoke*, then to the hands of the owners of a second *thoke*, and if even they do not take it then the transfer may be made in favour of any one he may like. And if in respect of the diminution or excess of price between the seller and the pre-emptor (*shafi*) any controversy comes in front, then according to the value of land in the adjacent villages the decision shall be made."

The reason why I have translated this clause of the *wajib-ul-arz* so minutely will appear from what I shall have to consider later on in delivering my judgment. Meanwhile it seems enough to point out that the clause begins by saying that every co-sharer of the village has power to transfer his share, and, after this statement, which only affirms one of the necessary incidents of ownership, it subjects the general right of transfer to conditions requiring that the intending seller should in the first instance offer to sell his

share to his co-sharers in the order mentioned in the clause, which also provides that in case of dispute as to the price, the question was to be settled with reference to the value of the land in adjacent villages. It is even more important for the purposes of what I am going to say further in this judgment, that whatever the nature of the right created by this clause in the *wajib-ul-arz* may be, that clause must be interpreted in the terms in which it has been framed, and that in considering those terms two points must not be lost sight of. The first point is that in referring to the right which the clause in the *wajib-ul-arz* either recognised or created, the term used for the person intended to possess such a right is the word "*shafi*," which is a very technical term of the Muhammadan Law of pre-emption, and signifies the pre-emptor with all such rights and obligations as that law prescribes for him.

The second point to be noticed in that clause of the *wajib-ul-arz* is that whilst it prescribes a specific rule as to the order in which pre-emption might be claimed and the manner in which the disputes as to the price are to be settled, it is *totally* silent as to the exact point involved in this case, namely whether the purchaser or the pre-emptor is entitled to the profits of the vended share for the period intervening between the sale and the acquisition of possession by the pre-emptor under the decree of Court whereby pre-emption was actually enforced. It is unnecessary to refer more minutely to the terms of the pre-emptive clause of the *wajib-ul-arz* which I have already quoted. It is enough to say that the terms of the clause are such as fall within the purview of a Full Bench ruling of this Court in *Karim Baksh Khan* v. *Phula Bibi* (1) where all the learned Judges then constituting this Court, concurred in holding that such clauses in the *wajib-ul-arz* are covenants which run with the land, and (as I gather from the judgments) are independent of the doctrine of notice as understood in equity in cases such as those contemplated by s. 40 of the Transfer of Property Act (IV of 1882) and the *illustration* to that section. I have referred to the effect of the Full Bench ruling, only by the way, not only because

(1) I. L. R., 8 All. 102.

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it enunciates the rule of law unanimously adopted by the whole of this Court, as then constituted, requiring my deference to the view, but also because in the vast majority of cases such clauses in the *wajib-ul-arz* would in equity amount to notice, and at any rate the exigencies of this case do not render it necessary to reconsider the question.

I therefore proceed to state the facts of this particular case further.

The pre-emptive suit of Deokinandan, defendant-appellant, which he had instituted on the 6th of March 1883, resulted in a decree enforcing pre-emption in his favour passed on the 8th of September 1883, and under that decree the price was deposited in Court on the 15th of November 1883, and possession was obtained by him formally on the 1st of December 1883.

What happened next was that in consequence of the success of the pre-emptive suit, the name of the purchasers Sri Ram and Chet Ram, plaintiffs-respondents, under the sale deed of 4th January 1883, was struck out of the Government revenue records, and the name of Deokinandan the successful pre-emptor was entered (by proceedings known as *dakhil kharij* or mutation of names) on the 17th of March 1884.

The defendant, besides being the successful pre-emptor, is also the lambardár of the village, and this fact explains the circumstance that in this litigation he appears not as plaintiff but as defendant. The litigation originated in a suit filed by Sri Ram and Chet Ram in the revenue Court for recovery of their share of the profits for rabi 1290 and kharíf 1291 fasli, the period being covered by the interval between the date of the sale to the plaintiffs and the date upon which the defendant obtained formal possession under his pre-emptive decree.

The suit was resisted upon various grounds, but the only ground with which we are concerned here was the plea that inasmuch as by reason of the defendant's pre-emptive decree he was substituted for the plaintiffs purchasers in the sale of 4th January 1883, the

plaintiffs were not entitled to any profits for the period intervening between the sale and the date on which the defendant was formally put in possession of the pre-empted share in execution of his pre-emptive decree. The Court of first instance accepted this plea in defence, and dismissed the suit without trial of the other issues which arose in the case.

On appeal by the plaintiffs to the lower appellate Court the learned Judge reversing the decree of the first Court remanded the case to that Court, under s. 562 of the Civil Procedure Code, for trial on the merits, holding that the plaintiffs were entitled to claim the profits for the period between the sale to them and the time when the defendant obtained formal possession under his pre-emptive decree.

In holding this view the learned Judge expressly relied upon a ruling of Oldfield, J. and myself in *Deodat* v. *Ramautar* (1), with especial reference to my judgment in that case. In the course of that judgment I said :—

"A pre-emptor, therefore, before his pre-emption is *actually* enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is only entitled to take by substitution, but has not yet actually taken. On the other hand, the original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits of the property which he can take only upon duly making such payment."

After saying this I went on to cite certain rulings, and to those which I then cited I may now add the case of *Emam-ood-deen Sowdagur* v. *Abdool Soobhan* (2) as having some bearing upon the question now under consideration, though the report is much too meagre to enable me to decide how far it may be taken to support the view which I expressed in the passage which I have quoted.

(1) I. L. R., 8 All. 502. (2) 7 W. R. 117.

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In the same judgment, however, after relying on the ruling of this Court in *Buldeo Pershad* v. *Mohun* (1) I went on to say :—

"The same rule was laid down by Straight J., in *Ajudhia* v. *Baldeo Singh* (2) which is the latest case upon the subject. I entirely concur in the principle upon which these rulings proceed; and if the exigencies of this case needed it, I would, by reference to the original texts of the Muhammadan Law, have shown that the principle is a necesary consequence of the very nature and incidents of the right of preemption itself."

Those exigencies have, however, arisen in this case, owing to the manner in which the case has been argued with especial reference to Muhammadan law by the learned pleaders for the parties, and I must therefore refer to the original texts of that law. But before doing so, I wish to mention that the learned District Judge is right in pointing out that the rule which I laid down in *Deodat* v. *Ramautar* (3) is consistent with that laid down in *Ajudhia* v. *Baldeo Singh* (4), and that my misreading may have been superinduced by the circumstance that in the phrase "when the subsequently *awarded* sale to the plaintiff took place," the word "awarded" is (as my brother Straight assures me) a misprint for the word "*avoided*." The question then is, what is the rule of the Muhammadan Law of pre-emption on the point now under consideration? In expressing my opinion on this subject I shall presently have to refer to the original texts of that law, but meanwhile I may cite the ruling of Roberts and Turner, JJ., in *Buldeo Pershad* v. *Mohun* (5) to show how those learned Judges propounded that law in a case similar to the one now before us, because that also was a suit by a purchaser for profits against the *lambardár*, of property which had subsequently been pre-empted. They do not seem to have doubted that the principles of the Muhammadan Law of pre-emption would by analogy be applicable to such cases, for they go on to say :—

(1) N.-W. P. H C. Rep. (1866) Rev. Ap. 30.
(2) I. L. R., 7 All. 674.
(3) I. L. R., 8 All. 502.
(4) I. L. R, 7 All. 674.
(5) N.-W. P. H. C. Rep. (1866) Rev. Ap. 30.

"On referring to the treatises on Muhammadan Law, we find it clearly laid down that the original purchaser is entitled to hold the land or other subject of pre-emption without rent or hire, while it remains in his hands, and if he has sown land the pre-emptor must wait for the ripening of the crops. In other words he is entitled to the enjoyment of it, and if he may enjoy it, it is clearly immaterial whether the enjoyment be by himself personally or his tenants, and this doctrine seems most in accordance with equity. The purchaser has in most instances paid the purchase money; is he to lose all interest and profits because, at some subsequent time, the contingency occurs that a pre-emptor claims and exercises his right of pre-emption, and is the pre-emptor who has kept his money in his pocket, till it suited his purpose to exercise his right, to obtain profit which will be the greater in proportion to his delay?"

This view is in accord with what I laid down in *Deodat* v. *Ramautar* (1), and I now proceed to show that it is the necessary result of the most authoritative texts of the Muhammadan Law of pre-emption. And in order to do so with clearness, I think it will be convenient to deal with the subject under two separate heads as propositions in themselves.

(1) That the enforcement of pre-emption is deemed to have taken place when, by virtue of his pre-emption, the pre-emptor obtains possession of the pre-emptional tenement, either under a voluntary surrender thereof by the seller or the buyer, or under a decree; and that unless and until such enforcement has taken place the buyer continues to remain the owner of the pre-empted property and it does not till then vest in the pre-emptor.

(2) That the buyer, during his possession as such, is entitled to appropriate the profits accruing from the pre-emptional tenement, and if pre-emption is enforced against such buyer, the pre-emptor is not entitled to claim such profits for any period antecedent to the enforcement of his pre-emption. In support of the first of these propositions I cite the following original authorities of the Muhamma-

(1) I. L. R., 8 All. 502.

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dan Law of pre-emption, taking the Hedáya as the first and highest in that system of jurisprudence (1). "The *shafi* does not become proprietor of the house until the purchaser surrender it to him, or until the Magistrate pass a decree, because the purchaser's property was complete, and cannot be transferred to the *shafi* but by his own consent or by a decree of a Magistrate; (in the same manner as in the case of a retraction of a grant, where the property of the grantee being completely established by the grant, it cannot be transferred to the grantor, but by the surrender of the grantee, or by a decree of a Magistrate) the use of this law appears in a case where the *shafi* after having preferred his claim before witnesses previous to the decree of the Magistrate or the surrender of the purchaser, dies or sells the house from whence he derived his right; or where the house adjoining to that to which the right of *shufa* relates is sold; for in the first of these instances the house is not a part of his hereditaments, because it was not his property, and the right of *shufa* fails in the second instance, as the fundamental principle of that right is extinguished previous to his becoming the proprietor; and in the third case, he has no right of *shufa* with respect to the house which is sold, since the house from which he would have derived that right is not his property"—(Hamilton's Hedaya by Grady, page 550).

This is a good paraphrastic translation of the original Arabic text of the Hedaya which I have cited, and I adopt it because it

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(1) تملک بالاخذ اذا سلمها المشتري او حکم بها الحاکم لان الملک للمشتري قد تم فلاینتقل الی الشفیع الا بالتراضي اوقضاء القاضي کما في الرجوع في الهبة و یظهر فائدة هذا اذا مات الشفیع بعد الطلبین او باع داره المستحق بها الشفعة او بیعت دار نصیب الدار المشفوعة قبل حکم الحاکم او تسلیم المخاصم لایورث عنه في الصورة الاولی و تبطل شفعة في الثانیة ولا یستحقها في الثالثة لانعدام الملک له *

(هدایه صفحه ۷۹۲)

brings out in clear light the point of law which that text lays down. Next in authority is the text of the *Fatawa-i-Kazi Khan* (1) :—

"A pre-emptor cannot acquire ownership until a decree for pre-emption be passed, or the pre-emptor obtain possession by mutual consent. If, therefore another house situated beside the house in respect of which pre-emption is claimed be sold, and the *kazi* pass a decree for pre-emption in favour of the pre-emptor subsequent thereto, and then the house (pre-empted) be surrendered to him, the pre-emptor is not entitled to take that other adjacent house by right of pre-emption, for he was not a neighbour of that house at the time of its sale."

Then come two texts from the *Fatawa-i-Alamgiri* (2), "With regard to pre-emption the rule is that it is lawful to demand pre-emption at the time of the actual occurrence of its cause, that this right is, in a manner, strengthened after such demand, and that a pre-emptor acquires a right of ownership by virtue of a decree of the *kazi* or of possession by mutual consent."

This is the first text and the next is (3) :—

"A pre-emptor does not become owner on preferring a claim for pre-emption until the *kazi* passes a decree for pre-emption, or

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(1) ولا يملكها الشفيع الالقضاء او رضاء حتى لو بيعت دار أخرى بجانب الدارا المشفوعة ثم قضى القاضي للشفيع بالشفعة ثم دفعها اليه لايكون لهذا الشفيع ان ياخذ لدار بالشفعة لان الشفيع لايكن جار للدار الثانية قبل قضاء القاضي *

(قاضي خان جلد ۴ صفحه ۵٦۳)

(2) اما حكمها فجواز طلب الشفعة عند تحقق سببها و تاكدها بعدالطلب و ثبوت الملك بالقضاء بها و بالرضاء كذا في النهاية *

(عالمگيري جلد ۵ صفحه ۵۲۱)

(3) بعد طلب التملك لايثبت الملك للشفيع في الدار المشفوعة إلا بحكم القاضي او بتسليم المشتري الدار اليه حتى ان بعد هذ لطلب قبل حكم القاضي بالدارله و قبل تسليم المشتري الدار اليه لو بيعت دار أخرى بجانب هذه الدار ثم حكم له الحاكم او سلم المشتري الدار اليه لايستحق الشفعة فيها كذا في المحيط للسرخسي *

(عالمگيري جلد ۵ صفحه ۲۸۱)

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until the house is surrendered to the pre-emptor by the purchaser (by mutual consent). Hence if (after the institution of the claim and before the passing of a decree) another house adjacent to it (that is the house pre-empted) be sold, and the *kazi* pass a decree of pre-emption after its sale, or the purchaser deliver possession of the pre-empted house to the pre-emptor, the latter is not entitled to the other house by pre-emption. So in the *Muhitus Sarkhasi.*"

I wish to cite two more texts upon the same point, the first being from the *Durrul Mukhtar*, and the other from the *Raddul Mukhtar*, commonly known as *Shami's* commentary on the former work. The *Durrul Mukhtar* has the following (1):—

"The pre-empted tenement becomes the property of the pre-emptor by taking possession by mutual consent or by decree of the Judge. The decree of a Judge is an alternative addition to taking possession (by mutual consent), because of the establishment of the pre-emptor's ownership by decree alone even before taking possession. So has been affirmed by *Mulla Khusrau*.

Shámi's commentary on the above passage is as follows (2):—

"He (the author of the *Durrul Mukhtar*) says by taking possession. He says so because the ownership of the purchaser has been perfected and therefore it cannot be transferred from him except by one of the above-mentioned two causes (that is by possession with mutual consent or the decree of the Judge) as is the rule relating to revocation of gift. Therefore if the purchaser has died or has sold

(1) و تملک بالاخذ بالتراضي او بقضاء القاضي عطف على الاخذ ثبوت ملک الشفيع بمجرد الحکم قبل الاخذ کما قرره ملا خسرو *
(درمختار صفحه ٦٩٨)

(2) قوله بالاخذ الخ لان ملک المشتري ثم فلا ينتقل عنه الا باحدى هما کالرجوع في الهبة — فلو مات او باع المستحق بها او بيعت دار بجنبها قبل الاخذ او الحکم بطلت و لو ازال المشتري ثم احدث بعد قبضه لم يضمنه و تمامه في الجوهرة — قوله عطف على الاخذ فلو قدمه عليه کما في الغرر لسلم من الايهام — قوله کما قرره ملا خسرو اي تبعا لغيره من الشراح *
(شامي جلد ٥ صفحه ٢٦٤)

the property whereby he has acquired the right (that is, the pre-emptive tenement) or an adjacent house has been sold before taking possession or the decree, the right (of pre-emption) is invalidated. And if the purchaser has eaten (that is appropriated) the fruit which came into existence after his possession, he is under no obligation thereof. All this in the *Aljauhara*. He (the author of the *Durrul Mukhtar*) says, that there is an alternative conjunction between taking possession and the decree of the *kazi*. It therefore follows that if he had got it (that is, decree of Court) before '*the taking of possession*', as in *Alghurar*, he might have saved himself from ambiguity. He says '*according to what has been affirmed by Mulla Khusrau.*' This means that he has done so by following others besides himself from among the commentators."

Now reading these texts carefully (and all of them are authoritative) there can be no doubt that under the Muhammadan Law of pre-emption the *ownership* of pre-empted property does *not* in the case of a successful pre-emptor, vest in him till he has *actually* enforced his right, whether by surrender by the purchaser, or under decree of Court, and that in either case his right of *ownership* does *not* take date from the time of the *sale* to the purchaser, but from such surrender or decree. As if this was not the acknowledged rule of the Muhammadan Law of pre-emption, I have been referred in the course of the argument to certain observations which I made in delivering my judgment in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (1) and especially to the observations at page 809 of the report, where I enunciated the rule that the right of pre-emption is not a right of repurchase either from the *vendor* or from the *vendee*, involving any new contract of sale; but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. And I went on further to emphasize the rule by saying, "It is, in effect, as if in a sale-deed the vendee's name were

(1) I. L. R., 7 All. 775.

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rubbed out and the pre-emptor's name inserted in its place". I have quoted these passages because they have been relied upon in support of the hypothesis that a pre-emptor's title of *ownership* dates from the date of the sale in respect of which he has enforced his pre-emption. It is enough to say that in the case where these observations were made the point now before us was not the subject of consideration, and that all that had to be considered then was whether the right of pre-emption was a right of repurchase created by the pre-empted sale itself or an inchoate right which existed before the pre-empted sale so as to render that sale a cause of action for a pre-emptive suit. I held then as I hold still that the right of pre-emption in its inchoate form exists in the pre-emptor antecedently to the sale of which he complains, or if it were not so, jurisprudence would decline to recognize that a right which did not exist at the time of the sale is created by the very sale which is complained of as an *injuria* to the right which that injury itself created. I did hold in that case as I hold still that the right of pre-emption is nothing more nor less than the right of the pre-emptor to be substituted for the purchaser in the sale in respect of which pre-emption is sought to be enforced. But when I spoke of substitution in that case, and as I speak of it now, I never said nor do I now intend to say that such substitution is independent of the rules of law imposed thereupon as conditions precedent to and governing such substitution itself. Among the conditions of such substitution as the pre-emptor can claim is the condition which the texts which I have cited indicate, namely that a pre-emptor's ownership does not vest in him till he actually enforces his right by one of the two methods which those texts contemplate, that is, either by surrender by mutual consent or by decree of Court. In the present case there is no question of surrender by mutual consent, and the dispute is as to what the defendant acquired under his pre-emptive decree of 8th September 1883 in execution whereof he obtained formal possession on the 1st of December 1883.

Now I have already pointed out, that according to the authoritative texts of the Muhammadan Law of pre-emption which I have

cited, the defendant as successful pre-emptor could not become owner of the pre-empted property till acquisition of possession by consent of the purchasers plaintiffs, or under decree of Court. There being no question of surrender by mutual consent, we have to refer to the law as to the decrees of the Court in such cases. That law is contained in s. 214 of the Code of Civil Procedure (Act XIV of 1882) under which the defendant-appellant's pre-emptive decree of 8th September 1883 was passed, and he obtained possession on 1st December 1883.

Does that section contemplate that by dint of such decree and such possession thereunder the defendant as successful pre-emptor was entitled not only to the pre-empted property but also to the profits for the period intervening between the sale and the acquisition of possession by the defendant under that decree? There is no contention that the decree contained any such terms as would either be inconsistent with or go in excess of the provisions of the section. I take it therefore that the appellant's pre-emptive decree of 8th September 1883 was framed in conformity with the requirements of s. 214 of the Civil Procedure Code, and that he obtained possession as successful pre-emptor on the 1st December 1883 in execution of that decree. I hold therefore that up to that date, namely the 1st December 1883, when, the terms of the decree were fulfilled and enforced, the plaintiffs respondents Sri Ram and Chet Ram as purchasers under the sale-deed of 4th January 1883 remained owners of the pre-empted share, and that such ownership did *not* vest in the defendant from the date of the sale notwithstanding his success in the pre-emptive-suit, and that his actual substitution as owner of the pre-empted property must date with his possession on the 1st December 1883.

This leads me to the consideration of the second question as enunciated by me at the outset, and the answer to it is only a corollary to what I have already said. For if the ownership of the pre-empted share did not vest in the defendant-appellant till he obtained possession by fulfilling his pre-emptive decree on the 1st December 1883, it follows that he had no right to appropriate the

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profits of the pre-empted share of which till then Sri Ram and Chet Ram, purchasers plaintiffs respondents, were owners.

I might have left the matter here, but because much argument has been addressed with reference to the rule of the Muhammadan Law of pre-emption as to the right to the profits of the pre-empted property during the interval between the sale and the enforcement of pre-emption by the pre-emptor either under surrender by the purchaser or decree of Court, I wish to state how that law deals with such a question. In doing so it is necessary to refer to some more of the original texts of that law, but before citing them to any purpose it is necessary to explain that the question now under consideration is dealt with by the authorities of the Muhammadan Law of pre-emption as a matter relating to the deduction from the price which the pre-emptor has to pay to the purchaser before enforcement of his pre-emptive right.

Treating the question in this manner, the author of Hedaya (*vide* page 558, Hamilton's Hedaya by Grady) contemplates two cases, namely the case in which land has been sold with the crop of fruit existing thereon at the time of the pre-empted sale, and the case where such fruit is produced after the sale whilst the land is in possession of the purchaser. He then goes on to say (1) :—

"In either of the two preceding cases, if the purchaser have gathered the fruit, and the *shafi* afterwards come and claim his privilege, he is not entitled to the fruit so gathered; for it is no longer an appendage of the ground. It is said in the *Mahsoot*, that if the purchaser have gathered any of the fruit, a proportionate abatement should be made in the price to the *shafi*: The compiler

(1) إن جذه المشتري ثم جاء الشفيع لا ياخذ الثمر في الفصلين جميعا لانه لم يبق تبعا لعقار وقت الاخذ حيث صار مفصولا عنه فلا ياخذه قال في الكتاب فان جذه المشتري سقط عن الشفيع حصة قال رضي الله عنه و هذا جواب الفصل الاول لانه دخل في البيع مقصودا فيقابله شيئ من الثمن اما في فصل الثاني يا خذ ماسوى الثمر بجميع الثمن لان الثمر لم يكن موجودا عند العقد فلا يكون مبيعا الا تبعا فلا يقابله شيئ من الثمن *

(هداية صفحه ۵۰۸)

of the Hedaya remarks, that this is in the former only of the two above mentioned cases; for the fruit being being produced at the time aud being actually and expressly included in the sale, it is natural to suppose that a part of the price was given in consideration of it; whereas, in the latter case, the fruit was not produced, and could only be included in the sale as a consequent, whence no part of the price could have been set against it."

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I have again adopted Mr. Hamilton's paraphrastic translation of the original Arabic text, because it brings forth the rule of law therein laid down, and that rule is made clearer by the author of the *Kifáya*, a well known commentary of the *Hedaya*.

Referring to the above cited text of the Hedaya, the commentator goes on to say (1) :—

"He (the author of the Hedaya) says '*and the trees have then brought forth fruit whilst in possession of the purchaser.*' He has placed this restriction according to his saying '*in the possession of the purchaser*' because in a case of the fruit coming forth whilst in possession of the seller before possession and then the purchaser has taken possession, the purchaser has a right to a share out of the price, as would be the case if the fruit existed at the time of the sale. He says '*in both cases;*' this means either in the case when the trees were bearing fruit at the time when the sale took place and then the purchaser removed them, or the case when there did not exist any fruit on the trees, and the sale took place only in respect of the land and the trees, and the latter brought forth fruit whilst in possession of the purchaser, who then separated them. In either of these cases the pre-emptor is not entitled to take the fruit."

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(1) قوله فاثمر في يدالمشتري قيد لقوله في يدالمشتري لانه اذا اثمر في يدالبايع قبل القبض ثم قبضة لمشتري له حصة من الثمن كما اذا كان موجوداً في وقت الشراء – قوله في الفصلين جميعا اى في فصل ما اذا كان في النخيل ثمر حين وقع الشراء ثم جده المشتري و في فصل ما اذا لم يكن في النخيل ثمرو وقع الشراء على الارض والنخيل فاثمر في يدالمشتري ثم جده المشتري لا يا خذ الشفيع الثمر في الفصلين *

(الكفايه على الهدايه صفحه ٩٣٩)

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It is clear from these texts that when land with a crop of fruit existing thereon *at the time of the sale* is purchased, an abatement of the price proportionate to the value of such crop will be made in favour of the pre-emptor because he is supposed to have purchased the property knowing that the fruit existed thereon, and that a portion of the price which he paid was in lieu of the crop of fruit then existing. But it is equally clear from the texts that when the crop of fruit come into existence after the sale whilst the land is in possession of the purchaser, no abatement of the price will be made in favour of the pre-emptor, and he has to pay the full price. The ratio of course is that during his possession as such, the purchaser under a subsequently pre-empted sale is owner of the property which he has purchased till pre-emption is actually enforced against him, and that during his possession as such owner he is entitled, as a natural incident of his right of ownership, to the produce of his own property.

That this is the rule of the Muhammadan Law of pre-emption appears further from the following texts of the *Fatawa-i-Alamgiri* which may be taken as the most authoritative work of Muhammadan Law for administering that system in India.

"If the buyer has already gathered the fruit which grew during his possession, and then the pre-emptor has arrived, then whether the fruit is still standing, or has been appropriated by the purchaser, by sale or by eating it, the pre-emptor must take the land and the trees in lieu of the whole price if he chooses, and he has no right to the fruit. So in the *Sirajul Wahhaj* (1)."

The next text is even stronger for showing that the produce of land during possession of the purchaser belongs to him and not to the pre-emptor.

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(1) فان كان المشتري لما حدثت الثمرة في يده جذها ثم جاء الشفيع وهي قائمة لوقدا ستهلكها المشتري ببيع او اكل فان الشفيع ياخذ الارض والنخل بجميع الثمن ان شاء ولا سبيل له على الثمر كذا في سراج الوهاج *

(عالمگيري جلد ٥ صفحه ٢١٨)

"If the land purchased contained a crop too small to fix its value, and if that crop subsequently ripened and was cut away by the buyer, and then the pre-emptor arrived and took the land by pre-emption, no abatement will be made in the price in his favour on account of the said crop. So in the *Mulutus Sarkhasi* (1)."

It is needless to multiply authorities on this point, for the authorities which I have already cited render the contention wholly untenable that under the Muhammadan Law of pre-emption the ownership of the pre-empted property vests in the successful pre-emptor from the date of the pre-empted sale without and before the pre-emptor having actually enforced his pre-emption by mutual consent, or by fulfilling the requirements of a decree of Court. Equally untenable under that law would be the proposition that during the interval between the pre-empted sale and the actual enforcement of pre-emption as above-mentioned, the pre-emptor is entitled to the profits of the pre-empted property of which he was not till such enforcement the actual owner.

That such is the rule of the Muhammadan Law of pre-emption in such cases, I have absolutely no doubt; and if I have referred to the original authorities at such length it is only out of deference to the contention which was seriously urged in the course of the hearing that such was not the rule of the Muhammadan Law of pre-emption.

To the argument so addressed much interest has been added by the contention that the parties to the present suit being Hindus the Hindu Law would be applicable to them, that there exists in this country a Hindu Law of pre-emption which we are bound to apply to this case under the Civil Courts Act (XII of 1887, s. 37) and according to the rule of justice, equity, and good conscience. It was further argued on behalf of the appellant that the rules

(1) و ان كان ارضا فيها زرع لاقيمة له فادرك المشتري الزرع و حصده المشتري ثم جاء الشفيع و اخذ الارض لايسقط شيئى من ذلك الثمن — كذا في محيط السرخسي *

(عالمگيري جلد ٥ صفحه ٢٥٧)

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of the Muhammadan Law of pre-emption are not even by analogy applicable to cases such as this, that the *wajib-ul-arz* represents only a covenant or agreement between co-sharers of a village, and as such a suit for pre-emption under the pre-emptive clause of the *wajib-ul-arz* must be dealt with practically as a suit for specific performance of a contract such as s. 40 of the Transfer of Property Act (IV of 1882) contemplates, the sale in this case being later than the time when that enactment came into force. In dealing with this part of the case as argued before us by the learned Pandit on behalf of the appellant, I will for the purposes of clearness deal with the argument under distinct heads. I will show :—

(1) That there is no law of pre-emption in the Hindu Law.

(2) That entries in the pre-emptive clause of the *wajib-ul-arz* are good *primâ facie* evidence of the existence of pre-emption in the village to which such *wajib-ul-arz* relates.

(3) That such custom must in the absence of anything to the contrary be taken to be founded on, and co-extensive with, the Muhammadan law of pre-emption.

(4) That in cases where it is shown that the custom or compact recorded in the *wajib-ul-arz* is in any respect not co-extensive with the Muhammadan Law of pre emption or is at variance from such law, the Court may administer a modification of that law according to the circumstances of each case.

(5) That where such custom or compact is silent upon any particular point the Court will follow the analogies of the rules of the Muhammadan Law of pre-emption on that point, so long as those rules are consistent with the principles of justice, equity and good conscience.

Now upon the first of these points the learned Pandit in order to show that the Hindu Law contains definite rules of pre-emption relied upon a text of the *Mahanirvana Tantra* (Chapter XII, verses 107-112) quoted by Babu Shyámá Charan Sarkar Vidya Bhushan, at page 627 of the second volume of his digest of the Hindu Law named *Vyvastha Chandrika*, where the original Sanskrit

text of the *Tantra* is also quoted. The text no doubt provides a right of pre-emption, but it has long been the subject of interest to eminent Sanskrit scholars, whose final decision is that it is of a recent date, that the *Mahanirvana Tantra* itself is not a work of authority in the Hindu Law, and that inasmuch as it provides a rule which does not exist in the authoritative works of the Hindu Law, such as the *Smritis*, or even works of less authority, the text is valueless for purposes of laying down any authoritative rule of the Hindu Law such as the Courts would respect and administered. It has indeed been even suspected that the text, occurring as it does *malàpropos* in the *Mahanirvana Tantra* itself, is an interpolation made some time in the reign of the Muhammadan Emperor Akbar, when strenuous efforts were made to bring the Hindu and the Muhammadan populations under practically the same law for temporal purposes. I have had before now to consider the exact authoritativeness of the *Mahanirvana Tantra* as an authoritative work of law. This was in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (1) and what I said upon the subject is to be found at pp. 785-790 of the report. I have no desire to repeat what I said then, because nothing new has been offered in the argument in this case beyond reference to the case of *Omed Roy* v. *Nackched Rai* (2) which is the solitary case which the learned Pandit has pointed out as supporting his contention that a Hindu Law of pre-emption exists and was in that case administered by the Court. The case was decided so long ago as 1830, and the report (at page 71) contains a valuable note in which reference is made to two earlier rulings, and the note ends by saying that Mr. Colebrooke "states the right claimed to be unsupported by Hindu Law, but suggests as probable that the claim may be found supported by local custom." The report of the case shows that it was decided upon the ground of local custom and general considerations of equity rather than upon any precepts of the Hindu Law, and so far as the case may be understood as an authority supporting the existence of a Hindu Law of pre-emption, I think it is enough to say that it has never been followed in that aspect either by the Sadar Diwani Adalats

(1) I. L. R., 7 All. 775. (2) S. D. A., Sel. Rep., vol. 5. p. 68.

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or by the High Courts. Babu Shyama Charan Sarkar at page 626 of his Digest of Hindu Law, *Vyvastha Chandrika*, Vol. II, does indeed devote a section to the subject of pre-emption, relying upon the text of the *Mahanirvana Tantra*, but he does not point out a single passage in the authoritative works of the Hindu Law, the *Tantra* being a work not upon law but on Mythology. Besides the absence of any reference to pre-emption in the legal authorities of Hindu Law, I am much pressed by the circumstance that if the rule of pre-emption existed in that system many more principles of decision would be provided therein to meet the numerous points which arise in enforcing that right. I wish also to point out that the learned author after quoting from the *Mahanirvana Tantra* ends up his section on pre-emption by saying that "upon the authority of the above, and also according to local usage which appears to have been founded on ideas taken from the Muhammadan, rather than from the Hindu Law, the right of pre-emption has become prevalent among the Hindus of the North-Western Provinces (*vide* p. 628). In the Full Bench case of *Fakir Rawot* v. *Sheikh Emambaksh* (1) Sir Barnes Peacock in delivering the judgment of the whole Court went on to say, "It may be noted as a significant fact that every term employed in connection with this right, including the name of the right itself, *shuffa*, is borrowed from the Arabic; and that the special appellant's pleader, himself a Hindu, could not, when questioned by the Court, refer to any term of Hindu origin connected with the subject." In the present case, however, the learned Pandit for the appellant relying upon a foot-note of Babu Shyama Charan's Digest, Vol. II, page 549 (precedents) suggested that the Sanskrit word *prativesikatwa* was the equivalent of the Arabic word *shufa*, just as Dr. Sir Monier Williams in his English-Sanskrit Dictionary has given *prakhyata* as the equivalent of *shufa* or pre-emption. I have no doubt that the Sanskrit language with its large vocabulary and enormous power of making compounds can furnish an equivalent to any idea; but the question is whether either of these terms is a term of the Hindu Law, and whether it is to be met with in any of the legal authoritive works

(1) B. L. R., Sup. Vol. 35.

of that system. No such suggestion has been made, and I must therefore hold that the mere circumstance of a Sanskrit word being formed to represent pre-emption is no more evidence of the existence of that right as a legal right in the Hindu Law than the Greek word *phonograph* or *microphone* and other similar terms are evidence of the existence of those instruments in ancient Greece. For the reasons which I have stated, I hold now as I did in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (1) that there is no law of pre-emption recognised by Hindu jurisprudence, and that therefore there is nothing in s. 37 of the Civil Courts Act (XII of 1887), to require us to administer a Hindu Law of pre-emption which never existed and does not now exist, and that the decision of this case must therefore rest upon the rule of justice, equity and good conscience as required by the second paragraph of that section.

I now pass on to the second point, and in doing so, I will first refer to the Full Bench ruling of this Court in *Isri Singh* v. *Ganga* (2) where it was laid down that a *wajib-ul-arz* prepared and attested according to law is *primâ facie* evidence of the existence of any custom of pre-emption which it records, such evidence being open to be rebutted by any one disputing such custom, and that when such *wajib-ul-arz* records a right of pre-emption by contract between the shareholders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the shareholders assented to the making of the record, and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders who repudiate such contract to rebut such presumption. This case was followed by my brother Tyrrell and Oldfield, J. in *Muhammad Hasan* v. *Munna Lal* (3) and I do not think that its authority has ever been doubted in this Court. And I may add that the manner in which the *wajib-ul-arz* was dealt with in these two cases, so far as they lay down the rule as to custom, is amply supported by the observations made by the Lords of the Privy Council in *Rani Lekraj Kuar* v. *Baboo Mahapal Singh* (4), notwithstanding the qualifying remarks which their

(1) I. L. R., 7 All. 775.
(2) I. L. R., 2 All. 876.
(3) I. L. R., 8 All. 434.
(4) L. R., 7 I. A. 63.

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Lordships made in the later case of *Uman Parshad* v. *Gandarap Singh* (1).

Applying the principles laid down by these rulings to the present case, I hold that the entries in the pre-emptive clause of the *wajib-ul-arz*, undisputed as they are, must be taken to represent the existence of a custom of pre-emption in the village, or at least are good evidence which has not been rebutted of a compact or agreement between the co-sharers as to the manner in which such right of pre-emption was to take effect. I have already quoted the pre-emptive clause of the *wajib-ul-arz in extenso*, and before going any further I wish to point out that the clause comes under the heading of pre-emption, and that whether it be regarded as enunciating the custom of pre-emption or a compact between the co-sharers, the words employed for pre-emptor and pre-emption are *shafi* and *shufa*, which are technical terms of a very definite meaning in the Muhammadan Law of pre-emption. I shall presently have to show that these technical legal terms connot be disregarded in interpreting the clause of the *wajib-ul-arz*, but meanwhile I pass on to the third point, namely that the right of pre-emption under the clause of the *wajib-ul-arz* must be taken to be founded on the rule of the Muhammadan Law of pre-emption which, sometimes in its entire integrity and sometimes in a qualified form, has been adopted by Hindu communities in these Provinces. I referred to this matter in delivering my judgment in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (2) in the observations which I made at page 790 of the published report. I still adhere to those views and do not wish to add anything to them beyond recalling attention to what I said in *Zamir Husain* v. *Daulat Ram* (3) at page 113 of the published report, and also to similar observations which I made in *Sheoratan Kuar* v. *Mahipal Kuar* (4), at page 267 of the published report relative to the manner in which pre-emptive clauses in the *wajib-ul-arz* must be interpreted as representing a custom or compact as founded upon notions of the Muhammadan Law of pre-emp-

(1) L. R., 14 I. A. 127.
(2) I. L. R., 7 All. 775.
(3) I. L. R., 5 All. 110.
(4) I. L. R., 7 All. 258.

tion, which notions are foreign to Hindu jurisprudence. It is not however upon my own judgments in previous cases that I wish to rely for the rule which I shall again lay down in this case. By far the most important and the most authoritative ruling upon this point is a Full Bench ruling of the Calcutta High Court passed by a Bench consisting of Peacock C.J.; L. S. Jackson, Shumbhunath Pandit, Levinge and Jackson, JJ. in *Fakir Rawot* v. *Shaikh Emambaksh* (1) where those learned Judges unanimously concurred in the judgment delivered by Sir Barnes Peacock, Chief Justice, who, after reviewing an enormous number of previously decided cases to be found in the reports, summed up the results of his judgment in terms which are so definite and clear that I think they cannot be too often repeated in order to save future litigation and discussion upon the point. The learned Chief Justice said :—" We therefore think the established law upon this subject is clear enough, that a right or custom of pre-emption is recognised as prevailing among Hindus in Behar and some other provinces in Western India, that in districts where its existence has not been judicially noticed, the custom will be matter to be proved, that such custom, when it exists, must be presumed to be founded on and co-extensive with the Muhammadan Law upon that subject, unless the contrary be shown; but the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan Law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record. In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously."

(1) B. L. R., Sup. Vol. p. 35.

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The principles upon which the rule so enunciated rest have never been doubted by the Calcutta High Court so far as I am aware, and I now proceed to show that they have not only not been repudiated by this Court, but that this Court has uniformly acted upon them. I have already pointed out that in *Buldeo Pershad* v. *Mohun* (1) which was a case very similar to this, Roberts and Turner JJ., applied the principles of the Muhammadan Law of pre-emption regarding profits between the sale and the acquisition of possession by the successful pre-emptor, though that case was between Hindus. But in the course of the argument it has been suggested that the Full Bench ruling of this Court in *Chowdhree Brij Lal* v. *Raja Goor Sahai* (2) lays down a rule of law which is inconsistent with the Full Bench ruling of the Calcutta High Court in *Fakir Rawot* v. *Sheikh Emambaksh* (3) which I have already cited. That the judgment of the Full Bench of this Court does not say so is clear from the report, and it is equally clear that the Full Bench ruling of the Calcutta Court was before the learned Judges of this Court when they delivered their judgment in the case which I have just cited.

The question then is to ascertain what was the exact rule of law laid down by the Full Bench of this Court in the case of *Chowdhree Brij Lal* v. *Raja Goor Sahai* (2), how far, if at all, it modifies the rule of law laid down by the Full Bench of the Calcutta High Court in the case of *Fakir Rawot* v. *Sheikh Emambaksh* (3) which I have already cited. This leads me to what I have enunciated as the fourth point of the argument on this part of the case, and since the head-note of the report in the Full Bench case of this Court is defective and inadequate, it is necessary for me at the risk of prolixity to quote some passages from the Full Bench judgment of this Court, the more so because I am afraid that the reports containing that case are out of print and not easily accessible.

Now the exact question which the learned Judges in that case had before them was "whether compliance with all or any of the

(1) N.-W. P., H. C. R. (1866) Rev. App. p. 30.

(2) N.-W. P. H. C., R. Full Bench Rulings (1866-67) p. 128.

(3) B. L. R. Sup. Vol. 35.

conditions prescribed by the Muhammadan Law, is indispensable to give validity to a claim of pre-emption, preferred under the stipulations of the record of rights known as the *wajib-ul-arz* prepared on the occasion of making or revising settlement."

Having thus formulated the question before them, the learned Judges of the Full Bench formulated their answer in certain propositions which I quote here *in extenso*. Referring to the question as enunciated by them, they go on to say :—

"We are asked to determine whether in deciding cases which involve the interpretation of pre-emptive stipulations the Courts of these Provinces ought to confine themselves to the terms of the instrument in which the stipulation is embodied or are to import all or any of the peculiar provisions of the Muhammadan Law." The learned Judges then after describing the various grounds upon which pre-emption might be claimed, observe:—"As regards general usage, it was declared by the late Sadr Court of these Provinces (1) that pre-emptive rights do not obtain as an universal custom among Hindus. To this statement we assent, with this addition that in some parts of India the custom has been found to prevail, accompanied with all the conditions attaching to pre-emptive rights under the Muhamadan Law."

They then refer to certain executive directions promulgated by the local Government to revenue officers in connection with the preparation of the *wajib-ul-arz*, and proceed to observe :—

"We have seen that Settlement Officers were instructed to induce the coparceners, whose property they engaged in settling, to come to an agreement on all subjects on which disputes were likely to arise; and probably on no point were disputes more likely to arise than on questions relating to the transfer of tenure. As in the case of the undivided family, no member could alienate his share of the common inheritance without the consent of the other members, so in the village community, which often had its origin in an undivided family, nothing could be more opposed to the feelings of the community than the transfer of any interest in the estate to

(1) 2 Select Reports, p. 477.

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one who was not a member of the village community. Hence at settlement it was not unfrequently admitted as an established usage, or agreed, that no alienation should be made by any coparcener to a stranger without the consent of the whole body of coparceners. But a stipulation of this nature practically operated to prevent a coparcener from obtaining the full value of his share, because it limits the market, that is the number of persons to whom he could without such permission sell. Consequently a modified provision was more generally adopted, whereby the coparcener was not restricted from selling for the best price he could obtain in the open market; but it was made incumbent upon him to give the opportunity of purchasing at that price to the other coparceners, commencing with those who, being coparceners, were first nearest to him in family, and next cosharers in the some *thoke* or *patti*. Such a stipulation, (a form of which is likewise given at page 195 of the settlement *misl*) it can easily be seen, was entirely in accordance with the spirit of Hindu Law and custom; it obtained still greater importance when the default of a single shareholder in contributing his portion of the revenue rendered the whole of the village or *patti* liable to sale. It seems reasonable to conclude that it was with a view to compass these ends, that is to say, to prevent the intrusion of a stranger into the estate of the family or community, and to exclude any person, whose want of thought or skill might augment the burdens of the other members of the coparcenary community, rather than from any desire to borrow an institution from their Muhammadan neighbours, that the communities caused stipulations for pre-emption to be inserted in the *wajib-ul-arz*."

The learned Judges then proceed to point out that the pre-emption provided in the *wajib-ul-arz*, is often in some of its incidents different to the incidents of the right of pre-emption under the Muhammadan Law, and in view of this circumstance, and probably especially with reference as to the surmise that, "pre-emption under the Muhammadan Law is confined to property in towns, such as houses and gardens or small walled enclosures and to such property only, while the *wajib-ul-arz* deals principally with the holdings"

of the agricultural community, they sum up their conclusions in the following words :—

"In view of the foregoing considerations, we hold that the pre-emptive conditions which are found in the *wajib-ul-arz* paper, are to be regarded generally as resting on a distinct basis from that of the *huq shuffa* under the Muhammadan Law, and that two of the earliest decisions of the late Sadr Court, in which this *dictum* was pronounced are worthy of acceptance (No. 105 of 1846, 2nd December, N.-W. P. 166 ; No. 727 of 1850, Reports for 1851, p. 214). In support of this ruling, we may also refer to the 194th paragraph of Directions for Collectors of Land Revenue, where the origin of the right, as created generally by stipulation at the time of settlement and as independent of the Muhammadan *shuffa*, is affirmed."

The learned Judges having thus in somewhat emphatic terms expressed the view that the pre-emption provided in the *wajib-ul-arz* must be regarded as founded on or originating from the rules of Hindu Law relating to joint undivided families, go on in specific terms to guard themselves from being misunderstood. They observe in continuation of what I have just quoted :—

"We do not mean to lay it down that a pre-emptive condition in a *wajib-ul-arz* may not be so expressed as to indicate that the Muhammadan custom of pre-emption prevails, and, in such case, it will be undoubtedly the duty of the Court, if called on to decide on the validity of a claim preferred under such a condition, to decide upon its validity, with reference to the special provisions of the Muhammadan Law, but if no clear expression is found that the parties intended that the Muhammadan right of pre-emption should be recorded as prevailing, and if on the contrary the words indicate a course differing from the requirements of the Muhammadan Law to be pursued by the vendor, and the would-be purchaser, then the stipulations of the *wajib-ul-arz* and those stipulations alone are to be regarded, and the Court must pass its decree with reference to the proof afforded that those stipulations have or have not been performed. In our view, if the *wajib-ul-arz* is to be regarded as a contract, the same laws of interpretation are to be applied

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as to other contracts; if, on the other hand, it is to be regarded as a record of usage or custom, the custom (if the terms of the instrument be clear) may be assumed to be recorded with all the incidents which are admitted to attach to it, and no new incidents not mentioned in the record ought to be imported into it, unless it be the manifest intention of the parties that they should be so imported."

From so much of the views expressed by the majority of the Full Bench in the above quoted passages, as attributed the historical origin of the right of pre-emption as recorded in the *wajib-ul-arz* to notions of the Hindu Law governing alienations of their shares by members of joint undivided families, Mr. Justice Roberts, who was one of the members of the Full Bench, expressed his emphatic dissent. Referring to the long course of decision whereby "the rules of law in this respect had become *certain* and *notorious*," he went on to say, "Upon the principle of the rule of practice *stare decisis*, to abide by former precedents, I would adhere to the principle laid down in the decisions above-mentioned. But I also think the decisions were right and in accord with the policy of the last settlement in which the right of pre-emption was generally introduced. Although the alienation of landed property by a separate copartner does not appear to have been subject to any restriction of pre-emption according to the sages of the Hindu law, inasmuch as it is laid down that separated brethren if they give or sell their shares may do that as they please, for they have power over their own wealth (*Nanarda* 43, Buhler and West, page 357) yet the general and unquestionable acceptance of the right of pre-emption by Hindus at the late settlement shows that the practice was consonant to their ideas and was familiar to them. That the practice and the policy was so known to the Hindus is attributable to their having observed the usage among their Muhammadan neighbours and applied it in many instances among themselves. It is reasonable to conclude, says Mr. Elberling, that, when the Company obtained possession of the country, the Muhammadan Law, modified by local customs was the real law of the land (*vide* Elberling, 3

and 4, and the authorities cited). However this may be with regard to cases of inheritance and of marriage and caste and religious usages and institutions in which the Courts have, as between Hindus, administered their law, yet the right of pre-emption as congenial to Hindus has been derived from the Muhammadan, so much so as to have been recognized as the customary law of some parts of the country."

I confess that upon the question of the origin of the pre-emptive right in India, I agree in the dissentient judgment of Mr. Justice Roberts, because with profound respect for the majority of the Full Bench in that case, I cannot help feeling that the conclusions at which they arrived on this point are based more upon theoretical surmises and hypotheses than upon the actual ascertainment of the facts of history in connection with the administration of justice in this part of the country. Nor do I intend to prolong my judgment by entering into a historical disquisition on the subject here. All I need point out is, what Mr. Justice Roberts pointed out, that for centuries before the British rule the law of the land was the Muhammadan Law, that that law had never to contend with any conflicting rules of the Hindu law of pre-emption, because (as I have already shown) no such law existed, that the Muhammadan rule of *shufa* draws absolutely no distinction between Muhammadans and non-Muhammadans, as was pointed out in *Zamir Husain* v. *Daulat Ram* (1); that when the British rule succeeded to the sovereignty of this country it found the Muhammadan law as modified by local customs actually administered as the law of the land; that so far as the right of *shufa* or pre-emption is concerned the British tribunals, such as the Sadr Courts, continued to administer that law, as is shown by the large number of cases to which Sir Barnes Peacock referred in delivering the judgment of the Full Bench in *Fakir Rawot* v. *Sheikh Emambaksh* (2), arriving at conclusions which were accepted in their integrity by Mr. Justice Roberts as relating also to the state of the right of pre-emption in these Provinces. Those conclusions are not only support-

(1) I. L. R. 5 All., 110. (2) B. L. R. Sup. Vol. 35.

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ted by the undoubted facts of the history of law in British India, but also by existing facts of the administration of justice in various parts of the country.

Among those facts is a proposition which cannot be controverted, and which apparently was not pressed upon the attention of the learned Judges forming the majority of the Full Bench from whom Mr. Justice Roberts dissented, that as matter of fact and not one of theoretical surmises or hypotheses, the right of *shufa* or pre-emption is unknown in those parts of India where Muhammadan jurisprudence had not in days gone by had full sway, and where Muhammadan influence was not felt as vigorously as in this part of the country and other parts of upper India, in Bengal and in some parts of the Bombay Presidency such as Guzarat. For instance it is unknown in the Madras Presidency, where the High Court in *Ibrahim Saib* v. *Muni Mir-udin Saib* (1) have gone the length of holding that even in the case of Muhammadans the doctrine of pre-emption is not law in that Presidency. Similarly in such parts of the Bombay Presidency as have not been subject to Muhammadan influence, the right of pre-emption does not prevail, and where it is found to prevail it has been distinctly held to prevail among the Hindus on no basis other than their acceptance of the Muhammadan rule of pre-emption. For this the case of *Gordhandas Girdharbhai* v. *Prankor* (2) is a distinct authority. That was a case entirely between Hindus, and the learned Judges after stating that there had been many cases disposed of by the Sadar Diwani Adalat of that Presidency, went on to say.—"There is no doubt that the custom in Guzarat is the Muhammadan right of pre-emption, or *hak shufa*; and therefore that in deciding such a suit as the present, it is to the particulars of that law we must look for guidance."

If it were a correct proposition to maintain that the law of pre-emption as contained in the *wajib-ul-arz* is an offshoot of the Hindu law relating to joint undivided Hindu families, I should have expected that in other parts of the country also, such as Madras and Bombay, where that law has had uninterrupted and full opera-

(1) 6 Mad. H. C. R., 26. (2) 6 Bom. H. C. R., 263.

tion, a similar doctrine of pre-emption might have been evolved by village communities and joint Hindu families. But there is no contention that any such evolutionary phenomenon has taken place, and its absence is all the more remarkable because so far as the joint Hindu family system is concerned, those parts of the country are governed by the Mitakshara school of Hindu law in common with this part of the country. Equally remarkable is the circumstance that in none of the numerous cases to be found in the printed reports has any attempt been made to engraft on to the right of pre-emption the analogies of the Hindu law relating to legal necessity for alienations and other similar doctrines as understood in that law. It is also a fact which must not pass unobserved that so far as the pre-emptive clauses in this part of the country are concerned, village communities which have entered those clauses are as often mixed communities of Hindus and Muhammadans as they are unmixed Hindu or Muhammadan communities, and yet in the vast majority of cases of pre-emption which come before this Court the terms of the pre-emptive clause are similar, and this fact, upon the hypothesis of the majority of the Full Bench, leads to the conclusion either that a Hindu law of pre-emption which never existed or an evolutionized form of the Hindu law as to joint undivided families, was adopted by the Muhammadans in such cases, an evolution which has not yet been recognized even by Hindus themselves in respect of sales of joint immoveable property such as houses and other buildings.

I do not wish to pursue the subject any further beyond respectfully repeating that I find it impossible to accept the conclusions of the majority of the Court in the Full Bench case of *Chowdhree Brij Lall*, v. *Rajah Goor Sahai* (1) so far as those conclusions attribute the origin of pre-emption in village communities to an evolution of the Hindu law relating to the joint Hindu family system. I have however no doubt that that system may have and probably did, restricting as it does the free right of sale, operate as a pre-disposing cause facilitating and rendering congenial the adoption by

(1) N.-W. P., H. C. R. F. B. Rul. (1866 67) p. 128.

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Hindus of notions of a pre-emptive right derived from and founded upon the doctrines of Muhammadan jurisprudence on that subject. Beyond what I have said as to the historical origin of pre-emption I do not dissent from the conclusions arrived at by the learned Judges of the majority in the Full Bench case which I am considering. I agree with them in holding that a right of pre-emption when adopted by village communities as a custom or compact and entered in the *wajib-ul-arz* may in some of its incidents be different from the rules of the Muhammadan law of pre-emption, that in such cases the Court should carefully interpret the terms of the pre-emptive clause of the *wajib-ul-arz* and give effect to them, even though they vary or modify the ordinary rule of the Muhammadan law of pre-emption in any respect, such as the indispensability of the immediate and confirmatory demands. This is the whole scope of the Full Bench ruling minus the theory as to the origin of pre-emption, and viewed in this light there is nothing in that ruling inconsistent with the principles laid down by Sir Barnes Peacock in the Full Bench case of *Fakir Rawot* v. *Sheikh Emambaksh* (1) to which I have so often referred, for that ruling clearly recognizes that where custom has varied the incidents of the Muhammadan law of pre-emption, the modification is to be respected by the Court, and this indeed was the *ratio decidendi* of the rule adopted by my brother Brodhurst and myself in *Zamir Husain* v. *Daulat Ram* (2). That case gave full effect to the Full Bench ruling of this Court, for there we dispensed with the preliminary demands of pre-emption in deference to the variations which were proved to have been made by the local custom. This leads me to the fifth point in this part of the case, namely, how is the Court to act in cases where the local custom or compact as entered in the *wajib-ul-arz* is totally silent as to any matter which by reason of the right of pre-emption being claimed becomes a necessary subject for adjudication, as indeed in this case. Upon this point the Full Bench ruling of the majority of this Court in *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (3) beyond laying down the broad rule that pre-emptive clauses of the *wajib-ul-arz* are

(1) B. L. R., Sup. Vol. p. 35.
(2) I. L. R., 5 All. 110.
(3) N.-W. P. H. C. R., F. B. Rul. (1866-67) p. 128).

to be enforced without "alteration or addition" throws no clear light, whilst I have said enough to show that the Full Bench ruling of the Calcutta High Court in *Fakir Rawot* v. *Sheikh Emambaksh* (1) and the Division Bench ruling of the Bombay High Court in *Gordhandas Girdharbhai* v. *Prankor* (2) clearly lay down that the analogies of the Muhammadan law of pre-emption must be looked to for guidance.

But the exigencies of deciding questions not provided for by the pre-emptive clause of the *wajib-ul-arz* as indeed also of local custom where that custom is silent, do often arise in an infinite variety of cases, and the best way to illustrate them is to refer to some of the reported cases which had to be decided by this Court, and I will before discussing them take them in their chronological order. Perhaps the first case which I should cite on this point is *Buldeo Pershad* v. *Mohan* (3) where Roberts and Turner, JJ., did not even doubt or hesitate to apply the rule of the Muhammadan law to a claim for profits during the interval between the pre-empted sale and the actual enforcement of pre-emption by possession of the pre-emptor. That case like the present arose out of pre-emption claimed under the *wajib-ul-arz*. So was the case of *Rajjo* v. *Lalman* (4) where a co-sharer in a village, who had under the *wajib-ul-arz* a right to the pre-mortgage of a share in such village and who in anticipation of enforcing his right mortgaged such share to a "stranger" (that is, a person who had not a preferential right to the mortgage) was held by my brother Brodhurst and myself to have forfeited his right. The *wajib-ul-arz* upon that point was silent, and my learned brother and I applied the doctrine of the Muhammadan Law of pre-emption, holding that such doctrine was in accordance with justice, equity and good conscience. Such also was the case of *Bhawani Prasad* v. *Damru* (5) where a co-sharer in a village, who had under the *wajib-ul-arz* a right of pre-emption in respect of the sale of a share, and who had joined a "stranger" (that is a person who had not such right) with himself in suing

(1) B. L. R., Sup. Vol. p. 35.
(2) 6 Bom. H. C. R., 263.
(3) N.-W. P. H. C., R. Rev. App. p. 30.
(4) I. L. R. 5 All. 180.
(5) I. L. R. 5 All. 197.

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to enforce such right, was held by my brother Tyrrell and myself to have forfeited his right of pre-emption, and we held this with especial reference to the analogies of the Muhammadan law of pre-emption, holding that such law on the subject was consistent with justice, equity, and good conscience, and should be enforced in the absence of any provision to the contrary in the pre-emptive clause of the *wajib-ul-arz* whereupon the suit was based.

Then comes the case of *Kashi Nath* v. *Mukhta Prasad* (1) in which Mr. Justice Duthoit and I concurred in adopting the analogies of the Mahomedan law of pre-emption even to the extent of regulating the form and scope of a pre-emptive suit under the *wajib-ul-arz*, and my learned colleague in that case concurred with me in holding that the provisions of s. 214 of the Code of Civil Procedure, must not (in the absence of specific provision therein as to suits by rival pre-emptors, and in view of the vast power which Courts of equity possess in framing their decrees) be read regardless of the analogies furnished by the Muhammadan Law of pre-emption. Again upon the same principle my brother Brodhurst and I in *Durga Prasad* v. *Munsi* (2) by again introducing the analogies of the Muhammadan law of pre-emption in a case founded on the pre-emptive clause of the *wajib-ul-arz*, concurred in holding that every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emp tive right. And my learned brother and I carried the rule further in a similar case of *wajib-ul-arz* pre-emption, in *Hulasi* v. *Sheo Prasad* (3) where we held that the prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption, by suing for a portion only of the property sold. Again the analogies of the rules of the Muhammadan law of pre-emption were applied to a case of *wajib-ul-arz* pre-emption by my brethren

(1) I. L. R. 6 All. 370. (2) I. L. R. 6 All. 423.
(3) I. L. R. 6 All. 455.

Straight and Brodhurst in *Harjas* v. *Kanhya* (1) where, approving the doctrine laid down in *Bhawani Parshad* v. *Damru* (2) which I have already referred to, my learned brethren concurred in holding that if a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the *whole* of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned.

These cases are sufficient to show that in connection with various difficulties arising out of the enforcement of the right of pre-emption even when claimed upon the pre-emptive clause of the *wajib-ul-arz* and in the absence of any specific provision in such clause upon any particular point, my brethren Straight, Brodhurst, Tyrrell and myself have followed the analogies of the Muhammadan law of pre-emption, and have laid down rules of law which by dint of those analogies have appeared to us consistent with justice, equity and good conscience. I do not wish to multiply instances of reported or unreported cases beyond those which show that the principle of adopting the analogies of tne Muhammadan law of pre-emption has also received the approval of the present Chief Justice of this Court.

In respect of this matter, the first case I refer to is *Ram Prasad* v. *Abdul Karim* (3) where I had the honour of being associated with the learned Chief Justice on the Bench. That was a case in which the *wajib-ul-arz* of the village in its pre-emptive clause consisted of the following laconic terms. "*The custom of pre-emption* prevails according to the usage of the country."

The pre-emptive suit in that case was based upon this clause of the *wajib-ul-arz*, and it was a suit between a Hindu pre-emptor and a Muhammadan purchaser defendant. To add to the difficulties of the case, there was no evidence to show the exact nature or scope of the custom of pre-emption prevailing in the district, nor was it proved that the plaintiff had satisfied the requirements of the Muhammadan law of pre-emption as to immediate and confir-

(1) I. L. R. 7 All. 118. (2) I. L. R. 5 All. 197.
(3) I. L. R. 9 All. 531.

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matory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time before suit willing to pay the actual contract price. In a case of this character the Full Bench ruling of the majority of the Court in *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (1) could furnish no help, and the learned Chief Justice dealt with it adequately (and entirely with my concurrence) at page 516 of the printed report. I remember that in the course of the hearing of that case, the theory of the law of pre-emption originating in an evolution of the Hindu law doctrine relating to alienations by members of a joint undivided Hindu family could not be driven far enough to cover the case then before us, and whilst fully concurring with the learned Chief Justice I pointed out that the use of the word *shufa*, a technical Arabic expression of the Muhammadan law, in the pre-emptive clause of the *wajib-ul-arz*, necessarily implied that it referred to custom as regulated by the Muhammadan law of pre-emption. The learned Chief Justice and myself concurred in holding that in the absence of evidence of any special custom different from or not co-extensive with the Muhammadan law of pre-emption, that law must be applied to the case, and that the suit was to be governed thereby. It is needless to add that the rule thus laid down by Sir John Edge, the present Chief Justice of this Court, is in full accord with the principle of the ruling of Sir Barnes Peacock, C.J. in the Full Bench case of *Fakir Rawot* v. *Sheikh Imambaksh* (2) to which I have already so often referred. I have referred to this case in particular at such length, because it explains and affirms the important doctrine to which it relates, and upon which the learned Chief Justice has acted in the more recent cases. One of them is the case of *Arjun Singh* v. *Sarfaraz Singh* (3) which happened to be an appeal under s. 10 of the Letters Patent from my own judgment sitting as a single Judge for deciding what have been termed "petty cases." The case was one of pre-emption based upon the pre-emptive clause of the *wajib-ul-arz* and it related to rival suits by rival pre-emptors, and in that case the learned Chief Justice

(1) N.-W. P. H. C. R., F. B. Rul. (1866-67), p. 128.

(2) B. L. R., Sup. Vol. p. 35.

(3) I. L. R., 10 All. 182.

and my brother Brodhurst concurred in holding, following the analogies of the Muhammadan law of pre-emption, which my judgment necessarily nvolved, that the pre-emptor's claim was inadmissible, since to allow it would have the effect of defeating the rule of that law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt. Now, it is important to remark that the analogical importation of the rule of the Muhammadan law of pre-emption was necessitated in that case because the pre-emptive clause of the *wajib-ul-arz* on which pre-emption was claimed, was silent upon that subject. The only other case upon this part of the argument to which I wish to refer is the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) which was decided by the learned Chief Justice and my brother Tyrrell, and besides being the latest case, I wish to dwell upon it as the most important authority for applying the rule that the analogies of the Muhammadan law of pre-emption must necessarily be respected in pre-emption suits not only out of choice but *ex necessitate rei*, as the only way of escaping the anomalies which the legal history of the administration of justice and jurisprudential notions would join in repudiating. In that case under one and the same deed a share in a village and a piece of land in the city of Moradabad were sold; and the plaintiff was entitled to pre-emption in respect of both the parcels so conveyed. In respect of the share in the village his right of pre-emption rested on the pre-emptive clause of the *wajib-ul-arz*, and in respect of the piece of land in the city his right of pre-emption arose out of the rule of Muhammadan law.

The suit was framed so as to seek enforcement of pre-emption in respect of both the properties conveyed by the sale, and there can be no doubt that such a suit was maintainable. It was however found that in respect of the piece of land in the city, the essential preliminaries of the immediate and confirmatory demands required by the Muhammadan law of pre-emption had not been duly performed, and that therefore the suit to that extent would necessarily fail, but in respect of the share in the village his right of pre-emption was not affected under the terms of the *wajib-ul-arz*.

(1) I. L. R., 11 All. 108.

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In this state of things the learned Chief Justice applied the principle of the rule that a pre-emptor, when he is entitled to pre-emption in respect of the entire subject of the sale, cannot break up the bargain of sale, and following the ratio his Lordship laid down the rule that where a pre-emptor has disqualified himself under the Muhammadan law from claiming a portion of the property sold, he is prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz*, though he is willing to pay the full purchase money and to leave in the vendee's hands the portion as to which he was disqualified under the Muhammadan law.

Now this ruling and the ratio upon which it proceeds recognises no less than four important principles of the Muhammadan law of pre-emption, and applies those principles to pre-emption claimed under the *wajib-ul-arz*, the terms of that document being silent upon the points to which those principles were applied. The first is that a pre-emptor cannot break up a bargain of sale unless the sale includes property in respect of which he has no right of pre-emption, as was the case before my brethren Straight and Brodhurst in *Harjas* v. *Kanhya* (1). The *second* principle is that the scope of a pre-emptive suit must comprehend the entire property to which the plaintiff's pre-emption extends, included in the bargain of sale. The *third* is that where a part of the pre-emptive claim fails the whole must fail, because a decree such as the Muhammadan law of pre-emption recognises cannot be framed. The *fourth* is that the rule against a breaking up of a bargain of sale is so fundamental that a defect in that respect is not cured even by the pre-emptor's willingness to pay the entire price and leaving a portion of the property in the hands of the vendee.

Now, if I am right in thinking that this is the effect of the ruling, I must necessarily be right also in holding that that case is a strong and most emphatic authority, consistent as it is with earlier rulings, for saying that this Court has uniformly applied the analogies of the rule of the Muhammadan law of pre-emption even to cases where pre-emption was claimed under the terms of the *wajib-*

(2) I. L. R., 7 All. 118.

ul-arz. And now I wish to make a few observations to show that the adoption of such a course is a matter *ex necessitate rei.*

In the case of *Zamir Husain* v. *Daulat Ram* (1) I made certain observations, which I am afraid were *obiter dicta* in that case, but which cannot be *obiter* in this judgment, and I will therefore incorporate them here. Referring to the judgment of Sir Barnes Peacock in *Fakir Rawot* v. *Sheikh Emambakhsh* (2) I went on to say—"I entirely concur in these conclusions, which appear to me to be in perfect accord with the rule of justice, equity, and good conscience upon which Courts of justice in India are bound to act in such cases. It is clear that it does not lie within the province of equity to create rules of substantive law, and the maxim *æquitas sequitur legem* necessarily implies the existence of rules of law which equity has to follow. With the exception of certain provisions of the local Acts applicable to certain provinces of India, like the Panjáb and Oudh, the Legislature, whilst recognizing the existence of the right of pre-emption in India, has hardly provided any rules in regard to that right; and even where the statute book notices the right, the rules laid down therein relate more to matters belonging to the remedy, *ad litis ordinationem,* than to subjects appertaining to the merits, *ad litis decisionem.* The Muhammadan law is the only system prevalent in India which provides substantive rules relating to the right of pre-emption in a systematic form. At least in Upper India the origin of the right of pre-emption is not traceable to any source other than Muhammadan jurisprudence which the Musalmans brought with them to this country. It may therefore be safely laid down that in all cases in which the right of pre-emption is claimed, the Courts in administering equity will, by analogy, follow the rules of the Muhammadan law of pre-emption, even in cases where the right is not claimed under that law, but under local usage or custom. The rules of customary pre-emption no doubt depend upon the custom itself, but where such custom is silent upon any particular point, the rules of the Muhammadan

(1) I. L. R., 5 All. 110. (2) B. L. R., Sup. Vol. 35.

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law of pre-emption upon that point must, by analogy, be taken to be the rule of decision."

I still adhere to these views and adhere to them so firmly that if I could find it possible to accept the hypothesis that the right of pre-emption in India owes its origin and practical prevalence to the rule of Hindu law as to joint undivided Hindu families, I would, notwithstanding all I have said here and before now from the Bench, unhesitatingly resort to the Hindu law of pre-emption for obtaining analogies such as the administration of the rule of justice, equity and good conscience which cases such as the present necessarily require. But as I have already said, no such Hindu law of pre-emption exists, and it would be in vain to resort to any of the authoritative texts of that law for guidance as to how such cases should be decided. Now, returning to the facts of this particular case, the pre-emptive clause of the *wajib-ul-arz* whether regarded as stating a custom or formulating the terms of a compact, must be interpreted according to the well recognized rules of interpretation, and among them I take it that one of the most important rules is that when technical terms are employed they are to be understood in such technical sense. I have already quoted the pre-emptive clause of the *wajib-ul-arz*, and do not find in it any technical term of Hindu law; but on the contrary the right and possessor of that right are described in technical terms of the Muhammadan law of pre-emption. I hold therefore that even as a pure matter of interpretation the custom or contract which the clause indicates, necessarily implies that upon points in respect of which it makes no specific provision to the contrary, the analogies of the Muhammadan law of pre-emption were intended by the parties to be imported, and that therefore in this case the rule of that law should govern our decision.

I might have ended my judgment here; but since in the course of the argument much doubt and difficulty was raised over the contention that the pre-emptive clause of the *wajib-ul-arz* was to be regarded as a contract for sale creating an obligation annexed to ownership of land such as those contemplated by the second para-

graph of s. 40 of the Transfer of Property Act (IV of 1882) read with the *illustration* to that section, I do not wish to end my judgment without dealing with this part of the argument. It was argued that the pre-emptive clause of the *wajib-ul-arz* being a contract for sale, the defendant's pre-emptive suit which resulted in the decree of 8th September 1883, must be regarded as a decree for specific performance of a contract for sale, and that since the rule of equity requires that that which should have been done may be taken to have been done at the time when it should have been done, therefore the sale of his share by Radha Ballab on 4th January 1883, to Sri Ram and Chet Ram, plaintiffs respondents, instead of the defendant-appellant, must be taken to be the date on which the title of ownership of the pre-empted share vested in the defendant-appellant Deokinandan, entitling him by dint of such ownership to the profits of the vended share for the interval between the date of the sale, namely 4th January 1883, and the actual enforcement of the defendant-appellant's pre-emptive decree by formal possession, namely, 1st December 1883, the which profits are the subject-matter of the present litigation. It was also suggested as an alternative argument that even if ownership did not vest in the pre-emptor Deokinandan defendant at the date of the sale to plaintiffs, he could claim the profits as the measure of the damages for the breach of the pre-emptive covenant in the *wajib-ul-arz* and recover such damages from the plaintiffs respondents, and therefore the present suit should have failed.

Now, in order to deal with this hypothesis, it is in the first place necessary to ascertain what a contract for sale is under our law, and in the next place to point out, for the sake of further clearness, that upon the hypothesis of this part of the argument, the pre-emptive clause of the *wajib-ul-arz* is to be taken as a contract for sale by Radha Ballab in favour of the defendant Deokinandan, who may analogically be called the would-be purchaser, the sale of 4th January 1883 by Radha Ballab to the plaintiffs-respondents Sri Ram and Chet Ram must be regarded as a breach of the contract for sale made by Radha Ballab with the defendant Deokinandan, and

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it is far from being unimportant to bear in mind that the plaintiffs-respondents were no parties to the contract, though they may be taken to have purchased with notice of the custom or covenant contained in the pre-emptive clause of the *wajib-ul-arz*.

Viewing the case in this manner, the question arises, what is a contract for sale as distinguished from an actual sale? The answer is well furnished by the excellent definitions contained in s. 54 of the Transfer of Property Act (IV of 1882), which definitions formulate what I understand to have always been the law of British India :—"Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised," a definition which clearly shows that the contract is an *executed* contract transvesting ownership the moment such contract is completed.

"*A contract for the sale* of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties". A definition which clearly shows that the contract is *executory* as distinguished from *sale*, which is an executed contract. And this excellent definition is followed by the significant enunciation of the rule that such a contract "*does not of itself create any interest in or charge on such property.*"

In a recent case I pointed out that this distinction is well founded in jurisprudence, and what I wish to do now is to show that even in the English Courts of equity, where peculiarly technical distinctions exist between what are known as *legal estates* as distinguished from *equitable estates*, a contract for sale does not *per se* and before the actual conveyance by sale invest the obligee of such contract, namely, the would-be purchaser, with ownership of the property in respect of which he has entered into the contract for sale. In the next place I will show that in India the doctrine of legal estates as distinguishable from equitable estates has never been recognized as relating to conveyances among Hindus and Muhammadans in the *mufassil*.

Now dealing first with the exact doctrine of the Courts of equity in England on this point, I do not think anything is to be gained by multiplying authorities, and I do not think I can do better than

quote a passage from the judgment of Sir Thomas Plumer, M. R. in *Wall* v. *Bright* (1) which was considered and approved by the House of Lords in *Shaw* v. *Foster* (2). Referring to the English doctrine of equity that the vendor of a contract for sale becomes a trustee for the vendee, the Master of the Rolls went on to say :—

"The vendor is therefore not a mere trustee; he is in progress towards it, and finally becomes such when the *money is paid*, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate. There are these essential distinctions between a mere trustee and one who is made a trustee constructively by having entered into a contract to sell, and it would, therefore, be going too far to say that they are alike in all respects. The principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate without affecting the legal."

This passage was cited by Sir R. Palmer in his argument for the respondent in *Shaw* v. *Foster* (2), and the report shows (p. 330) that the rule thus laid down was regarded by Lord Cairns as the same as that laid down by Lord Justice Turner in *Sherwin* v. *Shakspear* (3), and Lord Chancellor Hatherley in delivering his judgment in the House of Lords, referring to the passage which I have quoted from the judgment of Plumer, M. R. went on to say :—

"What was meant to be said by him in that case, and by me in the present, is this, that you must always take that coupled with this remark: that as regards the contract itself, which by a fiction of equity, as Sir Thomas Plumer calls it (for the words are his, and not mine), is considered to be complete when it ought to be complete you must not so use the words as to do away with the true intent of that fiction of equity, which supposes the *money to be paid away with one hand and the estate to be conveyed away with*

(1) 1 Jac. and W. 494-503. (2) L. R. 5 H. L. 321.
(3) 5 DeG. M. G 517.

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the other. In other words, you must not use that doctrine as a means of impeding the completion of the purchase."

The dictum of Plumer, M. R. in *Wall* v. *Bright* (1), and the manner in which that dictum was dealt with by the House of Lords in *Shaw* v. *Foster* (2) was the subject of much instructive consideration and almost criticism by Jessel, M. R. in *Lysaght* v. *Edwards* (3), but it would be lengthening this judgment unnecessarily if I said anything more than saying that the principles upon which the judgment of Jessel, M. R. proceeded were essentially based upon the English doctrine of real property which draws a distinction between what are called legal estates as distinguishable from equitable estates, with reference to the period of the transvesting of ownership by a contract for sale as distinguished from an *actual* conveyance by sale. All I need add is that notwithstanding this distinction, which is unknown to the Indian law (beyond the enforceability of a contract for sale against an actual purchaser with notice of the antecedent contract for sale such as s. 40 of the Transfer of Property Act (IV of 1882) contemplates), Jessel, M. R. referring to the vendor in a contract for sale went on to say:—

"He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser, and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase money and his right to enforce his security against the estate. With those exceptions; *and his right to rents till the day for completion*, he appears to me to have no other rights."

Now supposing for a moment that the English law as to equitable estates as distinguished from legal estates was to be applied to pre-emptive clauses of the *wajib-ul-arz* two things occur to me as a necessary consequence of such a supposition. The first is that the moment such a clause is duly entered in the *wajib-ul-arz* no co-

(1) 1 Jac. and W. 494. (2) L. R., 5 H. L. 321.
(3) L. R., 2 Ch. D. 499.

sharer of a village can fell his trees or do any other act of ownership derogatory to the estate under the hypothesis started in the course of the argument, because by doing so he might be reducing the value of the estate which he has already contracted to sell to him who may or may not claim pre-emption under the pre-emptive clause of the *wajib-ul-arz*. The next matter which I wish to point out is that even under the English law relating to equitable estates, depending much upon the doctrines of specific performance of contracts for sale, Jessel, M. R. took care in the judgment from which I have quoted and in the words which I have emphasized to point out that among the exceptions to which even the fiction of the English Courts of equity as to equitable estates was subject, was the exception that until the conveyance of sale is actually completed the holder of an obligation to a contract for sale is not entitled to the rents, but the vendor who entered into such a contract for sale.

I think it is needless to multiply authorities to maintain the proposition that even under the English law of specific performance of the contract for sale, and in the absence of specific covenants in the contract itself to the contrary, and before actual payment of the price, the Courts of equity in England will not enforce such a contract in such a manner as to deprive the vendor, namely the obligor of a contract for sale, of the rents and profits of the estate during the interval between the contract for sale, and the actual performance of that contract whether by actual conveyance by sale or by decree of Court which enforces such performance. Whatever the practice or rules of procedure may be in the English Courts of equity, one thing is certain, that the manner in which such decrees should be enforced here is clearly prescribed in s. 260 of the Code of Civil Procedure (Act XIV of 1882) which I find it impossible to read in any sense inconsistent with s. 214 of the same enactment, which deals with decrees passed in suits to enforce the right of pre-emption in particular.

Then comes another point in this part of the case, and in considering it, I have asked myself the question: Does the law of British India recognize any distinction between equitable estates

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and legal estates as understood in the English law in cases of the contract for sale and the rules of specific performance of such contract, when in breach of such a contract a *third* party has acquired an interest in the property whether by mortgage or by actual sale? My answer to the question is an emphatic negative, subject of course to the rule of justice, equity and good conscience upon which the second paragraph of s. 40 of the Transfer of Property Act (IV of 1882) is founded. And even in respect of that clause I hold, and I believe consistently with the principles of the Specific Relief Act (I of 1877) that when a contract for sale is made ownership of the property to which such contract relates is not transferred to the obligee of such a contract before the actual completion of the sale and more especially in cases where he has not already paid the price.

This would lead me to the citation of Indian authorities (including some of the rulings of the Lords of the Privy Council in appeals from British India); but before I do so I think it is as well to finish what I have been saying as to the doctrines of equity in Courts in England on the subject of the estate which the obligee of a contract for sale acquires under such a contract. I will quote from a text book of authority, Dart on Vendors and Purchasers, and the 5th edition of that work at page 246 contains the following :—

"It is sometimes stated, in general terms, that by the contract, the purchaser becomes, in equity, the owner of the property; but 'this rule applies only as between the *parties to the contract*, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a *stranger to the contract*, enforce equities attaching to the property property'—*per* Lord Cottenham, in *Tasker* v *Small*, 3 M. and C. 70; and see *Wall* v. *Bright*, 1 Jac. & W. 501)—nor, *semble*, can he as against the vendor enforce such equities, without at the same time praying or offering specific performance of 'the contract itself.—*Fox* v. *Purssell*, 3 Sma. & G. 242."

Then as to the crops and profits pending the completion of the actual sale, the same authority lays down the following as the law and equity as administered in England, as to the rights and obligations arising out of the contract for sale :—

"Up to the time fixed for completion, the vendor is, *in the absence of special stipulation*, entitled to the crops, or other ordinary profits of the land. He would not however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time *fixed for completion*, and pending negotiation, he may, it appears, in due course of husbandry, cut coppice or get in crops, but the net profits will belong to the purchaser. Where the contract was for the purchase of an estate, including the growing crops, to be completed and possession given on the 24th June, and the time was extended by consent till the 29th September, and the vendor in the interval sold the crops, the purchaser was held entitled, in equity, only to the crops growing at the time of the *actual completion*, and was left to his remedy (if any) at law for the recovery of the produce of the crops."

Now, even if the pre-emptive clause of the *wajib-ul-arz*, of which I have quoted the *ipsissima verba* at the outset, were to be regarded as a contract for sale, and even if I could hold that it was governed by the doctrine of the English Courts of equity as to equitable estates, I could not hold that with reference to the terms of the pre-emptive clause itself, time was of the essence of the contract, or that it created any specific rights depending upon the fixation of the date of the transfer, in favour of the defendant respondent Deokinandan, any more than in favour of any other existent or non-existent co-sharer of the village who under the general pre-emptive clause might in future be entitled to the right of pre-emption. And I take it that in such a state of things the Courts of equity in England, in view of the circumstance that neither the actual would-be-purchaser (that is, a possible pre-emptor) was mentioned in the covenant contained in the pre-emptive clause of the *wajib-ul-arz*, nor the so-called contract for

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sale specified any specific period when such contract was to be completed by actual sale, in view also of the circumstance that the so-called contract for sale might have been enforced not only by Deokinandan defendant-respondent, but also by other co-sharers of the village, by rival pre-emptive suits, would never hold that even the equitable estate of ownership vested in the defendent Deokinandan (pre-emptor) at the time when the pre-emptive clause of the *wajib-ul-arz* was framed and duly entered in that document. Nor can I hold upon the same supposition, that those Courts would award profits of the estate to the defendant-respondent Deokinandan (pre-emptor) for the period intervening between the date of the covenant in the pre-emptive clause of the *wajibularz* (taking under the hypothesis such clause to be a contract for sale) and the date when he actually enforced the covenant by paying up the price and acquiring possession under his pre-emptive decree. I have dwelt upon this matter at such length because the rule of equity in such cases was seriously doubted in the course of the argument, and also because it would be an unsound proposition to lay down that covenants contained in the pre-emptive clause of a *wajib-ul-arz* in these Provinces are to be regarded as governed by the peculiarly technical notions of the English Courts of equity as to equitable estates, or that the rules of those Courts as to the specific performance of contracts for sale are to be applied in their integrity to pre-emptive clauses of the *wajib-ul-arz*. I have said already more than once that the British Indian law recognises no such distinctions as those between equitable estates as distinguished from legal estates in England, for here the Courts take the actual date of a completed sale as the date of the ownership of the property passing from the vendor and transvesting in the vendee, entitling the latter to all the rights of ownership, including of course, the right to receive profits.

Now, before citing the case-law upon the subject, I may call attention to the principle upon which s. 85 of the Contract Act (IX of 1872) is based, because in my opinion that principle is identical with the one on which the definition of the contract for sale

of immoveable property in s. 54 of the Transfer of Property Act (IV of 1882) is founded. And in this connection I think the best case to cite is *Dhondiba Krishnaji Patel* v. *Ram Chandra Bhagwat* (1) where Westropp, C. J. dealing with the case before him, does not appear even to have doubted that under the Indian law the transvesting of ownership does not take place by the mere fact of a contract for sale, for that learned Judge after referring to s. 85 of the Indian Contract Act (IX of 1872) goes on to say :—

"In the mufassil of this Presidency, where there has been a contract for sale of immoveable property and a suit by the vendee for specific performance of it, the decree for the specific performance of the contract (coupled with the payment of the purchase-money) pass and have been treated, so long as we can recollect, as sufficiently passing, *i. e.*, transferring, the ownership to the vendee, and entitle him to the possession of the property."

Now, as to this case, I do not think it is necessary for me to say anything as to how far I am prepared to accept that ruling notwithstanding the provisions ss. 260, 261 and 262 of the Code of Civil Procedure (Act XIV of 1882) which apparently did not govern the case before the learned Chief Justice of Bombay, and I think it is enough to say that the case is a good authority for showing that the execution of a contract for sale is not a transvestive fact by itself in the sense of passing ownership from the obligor to the obligee of such a contract for sale, until such contract has taken effect either by actual conveyance by sale or under a decree of Court to that effect. And I think I may say in passing, that this is consistent with the doctrine of the Muhammadan law of pre-emption as to the investiture of the ownership in the pre-emptor of the pre-empted property, and the period at which such investiture of ownership is to be deemed as to have actually taken place. And I think I may further point out that under both the views of the aspects of the case, it is important, as Westropp, C. J. pointed out, that the actual payment of purchase-money was a matter of no insignificance.

(1) I. L. R. 5 Bom. 554.

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But there are cases of higher authority to show that a contract for sale, that is an agreement to transfer by sale, any property to any person or persons, is a merely executory contract, and does not operate as a sale *in praesenti*. The Lords of the Privy Council had to deal with this question in *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Singh* (1) and the connected case against Baboo Budhoo Singh (*vide* p. 305) where, after stating that the Sadar Court had held that "a complete title to the lands passed to the Rajah by virtue of the bill of sale on its execution, and (by a supposed application of the doctrines of English Courts of equity) that the vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money, and was to be held accountable as a mortgagee in possession for the rents and profits," their Lordships, after doubting whether such doctrines were applicable to a transaction of this nature between Hindus or between a Hindu or a Mussulman, went on to say (*vide* pp. 306-7), "It is not easy to see what principle of an English Court of equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sadar Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract, and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable."

Now, the principle thus laid down by their Lordships was approved by them again in *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (2), where repeating their observations in the earlier case they said—

"The bill of sale in such a case can only be evidence of a contract to be performed *in futuro* and upon the happening of a contingency,

(1) 12 Moo. I. A. 275. (2) 11 B. L. R. 36.

of which the purchaser may claim specific performance if he comes into Court showing that he has himself done all that he was bound to do."

I regard the two Privy Council rulings which I have cited, as distinct authority for holding, that at least in India, if not also in England, a contract for sale such as the covenant contained in the pre-emptive clause of the *wajib-ul-arz* in this case may possibly be taken to be, the investiture of ownership with its necessary legal incident of the right to receive profits, does *not* take place till an actual conveyance by sale is made, or the decree of Court has been obtained awarding specific performance of the contract for sale under the law governing such matters. Before going any further I think I may say that the interpretation which I have thus placed upon the Privy Council rulings is consistent with the interpretation placed upon those rulings by Couch, C. J. in *Tara Soonduree Chowdhrain* v. *The Court of Wards* (1) where it was held that an agreement to sell did not by itself operate as a *present* transfer of the property, and that upon the ground of such a transfer no suit of the nature of an action in ejectment could be maintained by the obligee of such a contract for sale, as against a person in possession. Yet, in the course of the argument in this case, it was seriously suggested that because this covenant contained in the pre-emptive clause of the *wajib-ul-arz* must be taken as a contract for sale, therefore upon the date when such covenant was entered in the *wajib-ul-arz* the defendant Deokinandan along with some others, acquired the same rights as those which belong to the obligee of a contract for sale as understood in the English Courts of equity, thus conveying upon that hypothesis, to the defendant-appellant Deokinandan rights similar to those which belong to the obligee of a contract for sale under the peculiarly technical notions of the English Courts of equity as to equitable estates vesting in a transferee before the actual conveyance is completed.

I think I have said enough to show, that such cannot be the case, either under the English rules of Equity Courts or under our

(1) 20 W. R. 446.

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law, as to the transvesting of the title of ownership, including of course the question as to the right to profits.

But, barring the matters of legal principles as to which I have expressed my opinion, perhaps the most important point is for us to see what actually occurred in this case with reference to the enforcement of the right of pre-emption under the pre-emptive clause of the *wajib-ul-arz*. I have already pointed out that that clause used *technical terms* of the Muhammadan law of pre-emption for creating or recognizing the right which that clause intended to provide for. I have also said enough to show that in my opinion that clause must not be read obliviously of the terms of the Muhammadan law of pre-emption which it employs; and I now proceed to show that the defendant Deokinandan himself understood the clause in that sense when he instituted his suit against the plaintiffs-respondents resulting in the decree of 8th September 1883, under which he obtained formal possession as pre-emptor on the 1st December 1883.

The suit which so terminated was not a suit framed so as to render it a suit for specific performance of a contract for sale as understood either in the English Courts of equity or understood by our own Courts. Nor, therefore, would the rules for specific performance of contracts for sale, whether as recognized in the Courts of equity in England or as recognized by our law in ss. 260, 261 and 262 of the Civil Procedure Code, apply to such a case except by careful analogy. The suit as framed and as understood all along by both the parties was an ordinary suit for pre-emption, and it was so dealt with by the Court which decided it by its decree of 8th September 1883. That decree imports nothing from the technical notions of the English equity Courts as to the specific performance of contract for sale, or as to the vesting of equitable estates, but is a decree simply framed, as it should have been, under s. 214 of the Code of Civil Procedure. The decree is to the effect that the plaintiff pre-emptor (namely the defendant-appellant Deokinandan) was to obtain possession of the pre-emptive property on payment of a certain sum of money into Court, and that on his failure,

his suit for pre-emption would stand dismissed with costs. The decree, in keeping with the terms of the pre-emptive clause in the *wajib-ul-arz*, was totally silent as to the profits of the estate conveyed by Radha Ballab to Sri Ram and Chet Ram, plaintiffs-respondents, on the 10th January 1883, for the period intervening between the date of the sale and the actual enforcement of pre-emption by any pre-emptor, including the defendant-appellant Deokinandan, under a decree of Court. The decree said nothing as to such profits being regarded as *damages* recoverable by the pre-emptor for breach of the covenant contained in the pre-emptive clause of the *wajib-ul-arz*, nor did it say that in any case such a decree could ever be made in a pre-emptive suit such as the one which terminated in favour of Deokinandan defendant-appellant by the decree of 8th of September 1883.

Now, I hold that in determining the questions which arise in this case, even if we avoided the real points of importance which arise out of the argument before the Full Bench, we are bound in this case to abide by the terms of the decree of 8th September 1883, in favour of Deokinandan, defendant-appellant. No matter whether the decree such as that which might or might not upon terms of the pre-emptive clause of the *wajib-ul-arz* have been made, an order that the profits of the pre-empted estate between the date of the sale by Radha Ballab to the plaintiffs-respondents (*i. e.*, 4th January 1883) and the date when the defendant-appellant obtained possession under his pre-emptive decree of 8th September 1883, is absent, as it should have been. The decree whether rightly or wrongly dealt with that litigation *not* as a suit for specific performance of a contract to sell, but as a pre-emptive suit, and the decree is in my opinion final for purposes of determining the rights of the parties to this litigation, for that decree was a civil Court's decree and dealt with the rights of the parties as to the sale of 4th January 1883, in respect of which the pre-emptive right was claimed by the defendant-appellant Deokinandan.

I hold that that decree did not award the profits of the estate sold so as to enable the pre-emptor Deokinandan defendant-appellant

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to claim them as his own for the period between the sale to the plaintiffs-respondents and the defendant's enforcement of his pre-emptive decree by payment of the price and obtaining possession, which did not take place till the 1st of December 1883. For these reasons, which I am sorry have taken up so much time to explain, I hold that to this case the principles enunciated by me in *Deodat* v. *Ramautar* (1) apply, and that the rule of decision should be the same as that adopted by Roberts and Turner, JJ. in *Buldeo Pershad* v. *Mohun* (2) to which I have already referred as a case on all fours with the present case. It follows as a natural corollary that, with much respect, I am unable to accept the rule laid down by my brethren Straight and Tyrrell in the case of *Ajudhia* v. *Baldeo Singh* (3), which has indeed been the cause of this case being referred to the Full Bench.

Since the effect of the learned Chief Justice's order of the 3rd January 1888, is to refer the whole case to the Full Bench, my opinion is, that the order of the learned Judge of the lower appellate Court should be upheld, and that this appeal be dismissed; the costs to abide the result.

Appeal dismissed.

PRIVY COUNCIL.

J. C.
P. C.
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January 22nd, 23rd, and 24th and February 8th.

HAYAT-UN-NISSA AND OTHERS, (PLAINTIFFS) *v.* MUHAMMAD ALI KHAN, (DEFENDANT).

[On appeal from the High Court for the North-Western Provinces.]

Inheritance by Muhammadan law—Sunni and Shia rules of descent—Evidence as to deceased having been a Sunni.

A Muhammadan widow, who by birth was a Sunni, but whose deceased husband had been a Shia, had during her married life conformed outwardly to his religion. The Sunni and Shia rules of inheritance differing, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death.

Present: LORDS WATSON, HOBHOUSE and MORRIS, SIR B. PEACOCK and SIR R. COUCH.

(1) I. L. R. 8 All. 502. (2) N.-W. P. H. C. R. 1866, Rev. Ap. p. 30.
(3) I. L. R. 7 All. 674.

The evidence relating to the period after her husband's death led to the conclusion that throughout her widowhood she was a Sunni, having returned to the religion of her youth when freed from the necessities of her position as the wife of a Shia.

Appeal from a decree (27th November 1884) of the High Court, reversing a decree (4th December 1882) of the Subordinate Judge of Moradabad.

The suit out of which this appeal arose was brought by the appellants against the respondent to obtain a declaratory decree that they were entitled, by the Imamia, or Shia, law to the estate of Wazir-un-nissa, who died in 1881. It was not disputed by the defendant that the plaintiffs were related to the deceased in the degree alleged by them, and that, had Wazir-un-nissa been a Shia at her death, they would have been her next heirs, the Imamia, or Shia, law ordaining a succession different from that which prevailed among Sunnis.

The High Court, reversing the finding of the first Court, decided that Wazir-un-nissa, when she died, was a Sunni. And the principal question on this appeal was whether the deceased at the time of her death was a Shia or a Sunni, points as to the admissibility of evidence being also involved. No question now remained as to a will, alleged by the plaint to have been made by the deceased, the first Court having found that it was not a genuine document, and that finding not having been appealed.

Karamat Ali, the common ancestor of the parties, had two sons, the younger of whom was the grandfather of Saiyid Muhammad Ali Khan, the defendant in this suit, who had obtained possession of the estate of Wazir-un-nissa, the granddaughter of the elder of Karamat's two sons. The right of Muhammad Ali to the inheritance, clear enough by Sunni law, was disputed by the daughters of the maternal uncle of Wazir-un-nissa, on the ground that the latter having belonged to the Shia sect, the Imamia law, which gave it to them, as nearer of kin to the deceased, was applicable.

The plaint alleged:—" Wazir-un-nissa, the parties and their families, have always professed the Shia religion, and therefore, according

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to the Muhammadan law, the plaintiffs alone are entitled to the whole estate."

This was denied by the defendant, Muhammad Ali Khan, who alleged that in her family "the estate of a deceased member has, since old times, been divided according to the law prevailing among Sunnis; and all the questions relating to the partition of the estate are settled according to the tenets of the latter."

The Subordinate Judge of Moradabad found that Wazir-ûn-nissa was a Shia; that the plaintiffs were the daughters of her maternal uncle; and that the whole estate was their nheritance, to no share of which was the defendant entitled.

On the defendant's appeal to the High Court, a Division Bench (PETHERAM, C.J., and MAHMOOD, J.) reversed that decision. They held that the law to be applied here was that of the widow at the time of her death; that law was the Sunni law, and therefore the defendant was entitled to succeed.

In reference to an argument in favour of the plaintiffs, attempted to be made out of the use of the word "parties" in section 24 of the Bengal Civil Courts Act (VI of 1871), the Chief Justice said—"This argument, against the devolution of the property in favour of defendant, is based on the section of the Act which provides that the law of the 'parties' is to be administered by the Court. But if this were held to mean the parties to the suit, and one were a Shia and the other a Sunni, it would follow that two laws would have to be administered. To my mind the meaning of the section is clearly that the devolution of the property is to be in accordance with the law of the person leaving the property, without distinction being made between a case of intestacy and one in which a will may be in dispute."

Mr. *J. D. Mayne*, for the appellants, argued that the Shia law should be applied, because, upon the whole evidence, the High Court should have found as a fact that Wazir-un-nissa died a Shia. The High Court has been wrong in holding that the litigation carried on in 1805 indicated the application of Sunni law to the

parties, as distinguished from Shia law. And that Court had failed to give proper effect to admissions made in 1864, which should have led to the belief that all the parties to the proceedings in that year, as well as Farzand, the common ancestor, were Shias. The High Court had also erred in admitting certain documentary evidence, which, however, if admissible, had not shown that the family property devolved in any manner opposed to Shia law. Wazir-un-nissa's pilgrimage to Ajmir was commented on, and it was contended that neither this act, nor her having consulted a pir, were inconsistent with her having been a Shia, the evidence in another part showing that she had maintained Shia ceremonies.

Mr. *R. V. Doyne* and Mr. *R. C. Saunders*, for the respondent, argued that the judgment of the High Court had correctly maintained the devolution of the property of the deceased in accordance with Sunni law. On the evidence, the deceased was a member of the Sunni sect at the time of her death.

Mr. *J. D. Mayne* replied.

The following authorities and cases were referred to on both sides :—

Hamilton's Hedaya, Prelim. Discourse, Baillie's Digest of Muhammadan Law, Book VII, of faraiz, or inheritance. *Rája Didar Hosein* v. *Ráni Zahuran Nissa* (1), *Mirza Kasim Ali* v. *Mirza Muhammad Hosein* (2).

Their Lordships' judgment was delivered by LORD WATSON:—

LORD WATSON.—This suit relates to the immoveable estate of Wazir-un-nissa, a Muhammadan lady, who died childless and intestate on the 26th October 1881. Her father, Ghulam Ali, died without male issue in the year 1838, leaving three widows, two of whom were childless. Besides the deceased, whose succession is now in dispute, Ghulam Ali had another daughter, Kulsum, married to Iradat Ali, there being one son of their marriage, who died in minority; and eventually Iradat Ali became entitled, as heir of his minor son, to his wife's share of her father's estate. After the

(1) S. D. A., Sel. Ca (1830), p. 29., 2 Moore, I. A. 441.

(2) S. D. A., 5 Sel. Ca. (1832), p. 213.

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death of Kulsum, Iradat Ali became the husband of Asmat-un-nissa, one of the parties to this appeal.

The appellants, plaintiffs in the suit, are the female descendants of Basawan Ali, the maternal uncle of the deceased Wazir-un-nissa. The defendant in the suit, and respondent in this appeal, is Muhammad Ali Khan, a collateral relative of the deceased in the ascendant line. The common ancestor of the parties was Karamat Said, whose younger son was father of Daud Ali, the father of the respondent. The elder son of Karamat had two sons, Kasim, the father of Ghulam Ali already mentioned, and Farzand, who died without issue. The appellants are Muhammadans, and so were Karamat and all his descendants, and the case must be decided according to the principles of Muhammadan law. But the rules of that law applicable respectively to Shia and Sunni succession are different; and, therefore, the true heirs of Wazir-un-nissa can only be discovered by first ascertaining to which of these rival sects the deceased belonged at the time of her death. The appellants allege that she was a Shia, the respondent that she was a Sunni. It is admitted that, according to the Shia rule, the appellants are her legal heirs; and it is also matter of admission that, according to the Sunni rule, the respondent, being a paternal ascendant tracing his connection with the deceased through an unbroken line of males, is entitled to take her estate to the exclusion of the appellants, whose relation to her is through a female. Whether the deceased was, in point of fact, a Shia or a Sunni, is the single issue presented for decision.

Wazir-un-nissa was for many years the wife of Saiyid Hadji, a staunch member of the Shia sect, who died in the beginning of the year 1865. The case made by the appellants in their pleadings and evidence is to the effect that Karamat and all his descendants were Shias; that Wazir-un-nissa was the daughter of a Shia, and brought up as a Shia; that she married a husband of her own sect, and ever after his death continued to adhere to the faith and to practise the ceremonies of that sect. On the other hand, the case presented in the respondent's evidence is that Ghulam Ali and his

daughter Wazir-un-nissa were Sunnis; that she was under the necessity of suppressing her true faith during the subsistence of her marriage, and of conforming outwardly to that of her husband; and that, on his decease, she resumed observance of the rites peculiar to the Sunni sect, and lived and died a member of it.

Upon all points material to the issue thus raised, with one or two exceptions, the oral evidence adduced by the parties is in direct conflict. There is evidence of a more reliable character, which may be used to test the value of the oral testimony, but even that evidence is not wholly consistent. The onus of proving that the deceased was a Shia rests in the first instance with the appellants, because they are seeking to eject the respondent, who is in possession and has been duly registered as owner in the books of the revenue authorities. The Subordinate Judge gave decree for the appellants in terms of their plaint, but his decision was reversed on appeal by the High Court, consisting of Chief Justice Petheram and Mr. Justice Mahmood, who dismissed the suit with costs. In his elaborate opinion the Subordinate Judge rests his judgment mainly on the evidence of the appellants' witnesses. He refers by name to two of these, whom he describes as respectable and literate men, *viz.*, Mirza Abid Ali Beg, the Subordinate Judge of Mainpuri, and Maulvi Tafazzul Husain, the Pesh Imaum of the Shias, by whom prayers are read to the congregation. There can be no reason to doubt that the learned Judge rightly describes the character of these witnesses, but the first of them does not state to which sect Wazir-un-nissa belonged; and the second, although he was acquainted with her husband, did not know Wazir-un-nissa, and his belief that she was a Shia was derived from "women of his brotherhood." On the other hand, the learned Judges of the High Court placed little reliance upon the statements of witnesses to the effect that the deceased was a Shia or a Sunni, being of opinion that certain facts, as to which there is no conflict of testimony, were sufficient, when taken in connection with the written evidence, to indicate that Wazir-un-nissa, although she appeared to be a Shia during her married life was in reality a Sunni.

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The oral evidence is not only contradictory but vague, and it is obvious that the bulk of the witnesses speak with little knowledge or from hearsay. But one part of it which is not open to that observation, is unquestionably favourable to the respondent's case. It shows that, after her husband's death, Wazir-un-nissa made a journey to Ajmere, in order to visit a Sunni shrine, in the company of a 'pir,' or spiritual guide of the Sunni sect, whose office and its functions are unknown among the Shias. It also shows that on her way to Ajmere the deceased partook of the holy meals, which are intended for Sunnis, in the house of the *pir*. These facts were hardly disputed in the argument addressed to us for the appellants; but the Subordinate Judge, who is conversant with the religious customs of both sects, disposes of them by the observation that "thousands of Hindus and Muhammadans, both Shias and Sunnis, especially women who are not acquainted with their religion, visit the shrine without changing their creed." The learned Judge makes no reference to the length of the pilgrimage, or to the companionship in which it was made. Mr. Justice Mahmood, who has no less knowledge of Muhammadan sects, says that the fact of the deceased having availed herself of the pious services of a *pir* implies a state of things which has no existence among the Shias, and that "it may safely be asserted that, if Wazir-un-nissa had been a Shia, she would have never gone to Ajmere as she did." The opinions thus expressed by the learned Judges are not necessarily inconsistent. According to that of the Subordinate Judge, the deceased, being a Shia, might very well have visited the Ajmere shrine if she was a woman unacquainted with the distinctive tenets of her sect; but he does not go so far as to say that she would, even in that case, have resorted to the ministrations of a Sunni *pir*. In any aspect of them, the facts create an inference adverse to the appellants. The most favourable inference of which they are susceptible is, that Wazir-un-nissa, after her husband's death, did that which would naturally be expected of a devout Sunni; but that she might possibly have acted as she did, if she was an ignorant professor of Shia principles. On the other hand, if the opinion

of Mr. Justice Mahmood be taken as correct upon this point (and there is nothing in the opinion of the Subordinate Judge which necessarily controverts it), these facts show that at the time of her pilgrimage Wazir-un-nissa professed her adherence to the Sunni faith. There is also oral evidence, not so clear or reliable as that which relates to the Ajmere pilgrimage, but tending in the same direction, to the effect that the deceased, during her widowhood, regularly observed the eleventh day of each month, and held Maulud Sharif meetings in her house, these being admittedly Sunni rites.

The facts proved, with respect to the religious observances of the deceased Wazir-un-nissa after her husband's death, all support the conclusion that she was a Sunni at the time of her own decease. It is, however, possible that these circumstances might be explained away, and, at all events, the evidence in support of some of them, which is not without contradiction, would be materially weakened if it were established that her father was a Shia, in which case there would be a very strong presumption that she was educated in his faith and continued in it until her marriage. That fact, if proved, might cast upon the respondent the onus of showing that on the dissolution of her marriage, she left the Shia and joined the Sunni sect. It is therefore necessary to refer to the period antecedent to her widowhood, and to the evidence which bears upon it. The oral testimony as to the sect of her father, Ghulam Ali, is vague and directly conflicting; and the written evidence, which is not free from conflict, becomes the only reliable test of the truth of the statements made by witnesses on the one side or the other.

Their Lordships do not attach much weight to the litigations in 1805 and 1810 between Kasim, the paternal grandfather of Wazir-un-nissa, and his brother, Farzand, with respect to the succession to their father. In the first of them Kasim founded on a deed of gift from his father, which Farzand alleged to be invalid; and the question of its validity was referred by the Sadar Judge to the kazi and the muftis of his Court, who returned an opinion that the gift was bad. The judgment of the Court went in favour of Kasim, upon grounds which did not involve any question as to the validity

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of the deed. In the second of them, which raised the same controversy, the Court merely repeated its former judgment. It is admitted that the opinion of the kazi and muftis was founded upon a principle peculiar to Sunni law, which denies effect to a gift of lands in which the shares of the donees are not specially defined. The respondent relies upon the terms of that opinion as evidencing the agreement of the parties to the suit that their father, Shah Ali, was a Sunni. But it must be kept in view that, at the date of these proceedings, the only course of succession recognised by the Native Courts was that of the Sunnis, which had been the general law of the country from the time when it first came under Muhammadan rule; and it is by no means certain that the Sadar Court, or litigants before it, always paid regard to, or understood their rights under the Shia law.

The observation just made does not apply to the state of the law in 1838, when the estate of Ghulam Ali was divided. Long before that time the supremacy of Sunni law had disappeared, and it must have been generally known that the Shia rule governed the succession of Shias, and the Sunni rule that of Sunnis. If Ghulam Ali was a Shia, his two childless widows had no right of inheritance, and were only entitled to maintenance from his estate. If he was a Sunni, then these widows were proper heirs, entitled to a share of his estate along with his other representatives, who were the same according to the rule of either sect. That Ghulam Ali's succession was treated by all parties interested as that of a Sunni, and that his childless widows received the shares which the Sunni law allots to them, appears to be established by the evidence. There is in process an attested copy of the official report made to the Collector of Revenue on the occasion of Ghulam Ali's death, in which it is stated that these two widows, along with the two daughters of the deceased, Kulsum and Wazir-un-nissa, and their mother, were his heirs at law. Vilayat Husain, a witness for the appellants, states that "Husaini Begam, wife of Ghulam Ali Khan, also received a twenty-fourth share out of her husband's property; other wives also received shares in the same proportion." Now it

is significant that Husaini was one of the childless wives, and that one twenty-fourth is the exact proportion to which each of the three widows was entitled in terms of Sunni law. That each of the widows got that share of her husband's estate is not contradicted, but two of the appellants' witnesses allege that they did not inherit it, and that it was given them in compromise of their claim of dower under the Shia law. On the face of it the statement is improbable, and it is disproved by the written evidence. There is a sale deed, dated the 11th July 1877, by Kulsum, one of the childless widows, by which she made over to Shaikh Imam-ud-din her interest in property "held conjointly with Saiyid Iradat Ali, Abid Ali and Musammat Wazir-un-nissa, muáfi holders, of which the 24th share belongs to me, as inherited from my husband, and up to this moment I am in possession thereof." That was followed in September 1877 by a pre-emption suit, at the instance of Iradat Ali, which he was entitled to bring, as in right of his minor son, on the ground that the interest sold by Kulsum came to her by inheritance from her husband, Ghulam Ali. There would have been no pretext for such a claim, if Kulsum had acquired her share by purchase, and not by inheritance. An ingenious argument was addressed to us by the appellants' counsel for the purpose of showing that the deed of sale and the copy plaint were not duly filed, and were not proved to be genuine; but both documents have been transmitted as part of the record in this appeal, and were founded on, in the judgment of the High Court. Besides, the fact that such a suit was brought is elicited by the appellants themselves on cross-examination. In these circumstances it is impossible to reject the documents *quantum valeant*, and it is obvious that, if the appellants meant to discredit them, Iradat Ali, who is husband of one of them, ought to have been called as a witness.

The fact that Ghulam Ali's succession was, immediately after his decease, treated as that of a Sunni by all parties interested, who were also those most nearly connected with him by ties of blood or affinity, would be well nigh conclusive, if it stood alone, as to the sect of which he was a member; and, in the absence of other evidence,

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would naturally lead to the conclusion that, before her marriage, Wazir-un-nissa was also a Sunni. But the appellants rely upon a judicial statement made on behalf of Wazir-un-nissa herself, in 1864, as evidencing the contrary. In the beginning of that year Daud Ali, the respondent's father, brought a suit for redemption of a mortgage granted by Farzand, his own cousin and paternal uncle of Ghulam Ali. In that suit Iradat Ali and the deceased Wazir-un-nissa intervened and claimed the right of reversion, on the ground that they, and not Daud Ali, were the legal heirs of the mortgagor, under the rules of the Imamia, which is the Shia sect. The rights of the parties claiming the reversion did not depend upon their own religion, but upon that of Farzand, the mortgagor; but in the written statement lodged for them it was broadly averred that not only Farzand, but all the parties to the suit, belonged to the Imamia sect. In answer to that averment Daud Ali stated that "although the parties belong to the Imamia sect, yet in the family of the parties the distribution of inheritance takes place according to the rules of the Sunni sect, and the same are still acted upon."

Had Daud Ali contented himself with the admission that Farzand was a Shia, his statement would have been sufficient for the purposes of the suit. But he does not dispute the allegation that the parties to the suit, including Wazir-un-nissa, were Shias. If the assertion made by the interveners had been deliberately sanctioned by Wazir-un-nissa, it would prove her to be a Shia at the time when it was made, and might also suggest the inference that she had been brought up as a member of the Shia sect. But there is no evidence to show that Wazir-un-nissa personally authorized the statement which was made on her behalf. The probability is that it was made by Iradat Ali, either at his own hand and for his own purposes, or with authority of her husband. The latter was alive at the time, and she was, outwardly at least, conforming to his religion, which was undoubtedly that of a Shia. It has already been noticed that Iradat Ali must be taken to have admitted, in 1838, against the interest of his family, which was virtually his own

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interest, that Ghulam Ali was a Sunni and that begets a presumption that his daughter was also a Sunni until the time of her marriage. In the absence of any explanation from Iradat Ali, it cannot be assumed that the statement made in 1864 was meant to contradict that inference, or to go beyond the assertion that at the time when it was made Wazir-un-nissa was a Shia.

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In these circumstances, their Lordships have come to the conclusion that the evidence applicable to the period preceding the death of her husband tends, though not strongly, to the inference that, from her birth until her marriage, Wazir-un-nissa was a Sunni. It is not matter of dispute that, during the whole period of her married life, her outward acts and observances amounted to a profession of the Shia faith. What the just inference from these facts would have been had she died on the same day as her husband, it is not necessary to consider. The evidence applicable to the period following the dissolution of her marriage appears to their Lordships to point strongly to the conclusion that, throughout her widowhood, she was a member of the Sunni sect, having returned to the religion of her youth, and discarded that which was temporarily imposed upon her by the necessities of her position as a Shia wife. They will accordingly humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The appellants must bear the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants; Messrs. *Robinson* and *Turnbull.*

Solicitors for the respondent; Messrs. *Bird* and *Moore.*

FULL BENCH.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

MUHAMMAD INAYAT HUSAIN (PLAINTIFF) *v.* MUHAMMAD KARAMAT-ULLAH (DEFENDANT).

Lambardár and co-sharer—Suit by recorded co-sharer for profits—Claim for profits not collected in consequence of defendant's negligence or misconduct—Jamabandi—Evidence—Burden of proof—Act XII of 1881 *(N.-W. P. Rent Act), ss.* 93 *(h),* 209—*Act I of* 1872 *(Evidence Act) s.* 106.

In a suit under s. 93 (*h*) of the N.-W. P. Rent Act (XII of 1881), by a recorded co-sharer against a lambardár for his recorded share of the profits of a mahál, in

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which the plaintiff seeks to make the defendant liable under s. 209, not only for the profits which the latter has actually collected, but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. No general rule can be laid down as to the quantum of evidence which the plaintiff in such a case must give in order to shift the burden of proof on to the defendant. The mere production by the plaintiff of the *jamabandi* or rent-roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. S. 106 of the Evidence Act (I of 1872) does not apply to such a case.

So *held* by the Full Bench, Mahmood, J., dissenting.

Held by Mahmood J., *contra*, that the production of the *jamabandi* by the plaintiff in a case where he claims his share of the profits according to the *jamabandi* and the lambardár-defendant pleads that the actual collections fell short of the *jamabandi*, established a *primâ facie* presumption in favour of the plaintiff so as to throw upon the defendant, with reference to s. 106 of the Evidence Act, the necessity of proving circumstances which rendered it impossible for him to collect the profits according to the *jamabandi*.

The parties to this suit were co-sharers, and the defendant was the lambardár collecting the rents of the patti. The plaintiff, as the owner of a one-third share of the patti, instituted this suit under s. 93 (*h*) of the N.-W. P. Rent Act (XII of 1881), for the recovery of Rs. 457-7-0 as his share of the profits for the years 1282 to 1291 fasli.

The defendant pleaded *(inter alia)* that the plaintiff's share of the profits for the years in question amounted to Rs. 48-6-6.

The Court of first instance (Deputy Collector of Budaun) held that the plaintiff's share must be calculated according to the recorded rent-roll; that the defendant had failed to prove the arrears of rent; and that "no attempt was made by the defendant to recover the arrears." The Court further found that the plaintiff's share of the profits amounted to Rs. 418-6-10, and to that extent decreed the claim.

On appeal by the defendant, the lower appellate Court (District Judge of Sháhjahánpur) held that "the actual recoveries and not the gross rental of the estate must be made the basis of calculation of profits in view of the fact that the plaintiff has not discharged himself of the burden of proving that there was negligence or

dishonesty." The Court, applying this principle, held that the plaintiff was entitled only to a sum of Rs: 197-11-4, and modified the decree of the Court of first instance accordingly.

The plaintiff appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

BRODHURST and MAHMOOD, JJ.—Mr. *Abdul Majid*, on behalf of the appellant, contends that the lower appellate Court has wrongly cast the burden of proof as to the amount of rent on the plaintiff-appellant; that it did not lie on the plaintiff to prove the gross negligence or misconduct of the lambardár in collecting rents; and that in the present case, the lambardár having failed to explain why a portion of the rental was not realized, the decree of the first Court should have been allowed to stand. On the other hand, Pandit *Bishambhar Nath*, on behalf of the respondent, relies on a ruling of this Court in *Dhanak Singh* v. *Chain Sukh* (1) in which it was held that where a co-sharer claims a dividend on the full rental of the mahál, and the lambardár pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardár, in the sense of s. 209 of the N.-W. P. Rent Act, before he can succeed in getting a decree for a sum in excess of the actual collections. There can be no doubt that this ruling supports the respondent's case, but it is not altogether in accord with the principle of two other rulings of this Court—*Sees Rám* v. *Chait Rám* (2) and *Inayat Husain* v. *Ghulam Ali* (3), and the question is of sufficient importance to require consideration by a Full Bench. The question which we would refer to the Full Bench is :—

In a suit under s. 93 (*h*) of the Rent Act, in which a co-sharer claims his share of the profits according to the rent-roll, and the defendant-lambardar pleads that the actual collections fell short of the rent-roll, on which party does the burden of proof lie in respect

(1) I. L. R., 8 All. 61. (2) N.-W. P. H. C. Rep. 1867, p. 266.
(3) N.-W. P. H. C. Rep. 1867, p. 276.

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of gross negligence or misconduct within the meaning of s. 209 of the Rent Act?

With these observations we direct that the case be submitted to the learned Chief Justice for orders as to our referring this question to the whole Court.

The point was accordingly referred to the Full Bench.

The parties were represented as before.

MAHMOOD, J.—The facts of the case are stated in the order of reference, dated the 24th October 1887, passed by my brother Brodhurst and myself, whereby the case was referred to the learned Chief Justice for orders as to whether it was or was not to be considered by the whole Court. The learned Chief Justice by his order of the 28th October 1887, directed that the case was to be heard by the whole Court, and it is in consequence of that order that the question which the order of reference involves has to be considered by this Bench.

Now in making the order of reference, dated the 24th October 1887, my brother Brodhurst and I formulated the question in the following terms :—

"In a suit under 93 (*h*) of the Rent Act, in which a co-sharer claims his share of the profits according to the rent-roll, and the defendant-lambardár pleads that the actual collections fell short of the rent-roll, on which party does the burden of proof lie in respect of gross negligence or misconduct within the meaning of s. 209 of the Rent Act?"

Now I understand this is the solitary question which has been referred to the Full Bench, and that it is not the whole case but this solitary question. In the referring order, reference is made to certain previous rulings of this Court which necessitated the reference, and because the rulings as contained in the order do still in my mind create a doubt, I think I should state the exact reasons why the question was sufficiently important to be considered by the Full Bench. There is no difference of opinion that in connection with such cases the rules of the statute law as contained in the Rent

Act are to be borne in mind and that such rules must in great measure affect the question of the *onus probandi* which the question referred to the Full Bench involves. In my opinion a system under which such powers as the lambardár possesses in the part of Her Majesty's territories called the North-Western Provinces, is governed not only by Act XII of 1881 but also by the Revenue Act (XIX of 1873), and it is on this account that I would read Act XII of 1881 as replacing Act XVIII of 1873, in conjunction with the provisions of Act XIX of 1873 which defines the revenue law applicable to these Provinces.

I regard both these statutes to be *in pari materia*, and they must therefore be read together for the purpose of ascertaining the exact difficulty which arises over the matter of procedure such as that contained in the exact question which my brother Brodhurst and myself referred in the order of 24th October 1887.

It would be taking up the time of the Bench for me to say more than this, that in India there are only four recognised systems under which the collection of revenue is made by Government, which keeps the peace for the revenue which it collects, and that as a part and parcel of the revenue system the most important in the Presidency of Fort William in Bengal is the system of zamíndári tenure which has been well recognized ever since the attainment of sovereign authority by the East India Company, as a system best calculated for the purpose of the collection of rent, the rent which is recovered from the tenant being utilized by him who collects it to pay the Government revenue which is due to the sovereign authority. This being so, the difficulty rests with the question, what is the position of a person such as the defendant in this case, Muhammad Karamat-ullah, in suits of such a character as that which is now before us for consideration?

I am of opinion that the authority of the lambardár, as it stands under the statute law in these Provinces, is so supreme that it might be almost partially to lower it to say that he is the agent for other co-sharers of the village. The lambardár is one of the co-sharers of a village in which more zamíndárs than himself exist, and as such he

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is not a person appointed as agent by his co-sharers, but a person who has been appointed by dint of the statute law itself and by dint of the authority exercised by the revenue officers who have appointed the lambardár as a person having authority practically to oust all exercise of minute details of the rights of ownership which might otherwise be exercised by any co-sharer of the village. When I use the word "village" I mean the revenue unit or mahál, because under the ordinary zamíndári system every mahál has a lambardár. There is enough in the Rent Act, especially in the sections which prevent a co-sharer from trying either to give a lease for any field or trying to recover any rent for any particular field from a tenant or even adopting any method for recovery of rent, to show that the lambardár is a creation of the statute, and as such holds powers which otherwise a corporation, such as an ordinary mahál or village consisting of more than one sharer, might practically have for the purpose of deciding whether such authority was or was not to be conferred upon any particular individual.

Now this being so, the exact question before us is what my brother Brodhurst and I meant by the use of the word "rent-roll." We meant the *jamabandi*, and it is in this sense that the question was to be understood. In these cases when difficulties arise between co-sharers such as the lambardár, because he is one, and other co-sharers who are ousted from exercising some powers of ownership, it is for us, in dealing with the question of the amount of profits, to consider upon whom would rest the burden of proof. The ruling which mainly gave rise to this reference is *Dhanak Singh* v. *Chain Sukh* (1) and, so far as I am concerned in making the reference, I would only say that the rule therein laid down would have been accepted by me *in toto* if it did not go further than what I am going to adopt.

Taking the matter now, the question stands thus: a co-sharer who is not the lambardár comes into Court with an allegation that according to the rent-roll of the village, namely, the *jamabandi*, in the preparation of which the defendant-lambardár has the greatest

(1) I. L. R. 8 All. 61.

share, the share of profits to which the plaintiff was entitled was, as in this case, much larger than what the lambardár-defendant with the power as to the collection of rent and as to the adopting of the process of law, in fact realized. Neither in the present case nor in any other case of this character should I lay down a rule that the rent-roll is to be accepted as a piece of conclusive evidence in the sense of its not being capable of being controverted, or any rule which would attach to it a value greater than that which it would deserve as an official paper prepared under the rules of the zamíndaári law to which I have referred.

In cases of this character it does, indeed, lie upon the plaintiff to show a *primâ facie* case for the purpose of recovering more than what the lambardár as a recognized or authorized agent has collected from the tenants. The question referred to us is, whether such *primâ facie* evidence is or is not sufficient when the rent-roll, of which, I repeat again, the lambardár has the greatest share in preparation, has been produced. I am of opinion that the production of the rent-roll coupled with the allegation such as that made in this case, is sufficient in itself to furnish *primâ facie* evidence to put it upon the defendant-lambardár to prove that the rent-roll could not be collected, because of certain circumstances which he may allege. There may even be cases in which the profits are even greater than those included in the rent-roll, namely, the *jamabandi*.

I have been speaking of the *jamabandi* more than once as the rent-roll, and I will therefore only refer to the exact explanation of the term as contained at page 739 of the appendix to Field's notes on the Law of Evidence (4th edition).

That being so, the question stands, how under the present state of the Rent Law the question of *onus probandi* has to be decided. One thing is perfectly clear from what I understand of the revenue system in these Provinces, namely, the zamíndári system, and it is that there should be a lambardár; that the lambardár is not necessarily appointed by the unanimous concurrence of the co-sharers; that he is appointed by the revenue officer who is in charge of collecting Government revenue and who is in charge of seeing that

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every co-sharer must receive his due share of the profits; and also that irrespective of the desire of the co-sharers, the lambardár must be appointed by dint of the authority which requires the collection of Government revenue. It is because the lambardár does possess this as the basis of his authority that he has statutory functions to discharge, and it is because of these functions that he is a person most capable of giving information as to what lay fallow; whether or not any particular tenant died or absconded; whether there were any special reasons why a canal or watercourse ceased to give water so as to induce the tenant to abscond; or whether there had been any drought; and other matters concerned with the non-collection of the amount due under the rent-roll. I am of opinion that this is the state of things which the zamíndári law has necessitated, and that it is therefore necessary to refer to s. 106 of the Evidence Act (I of 1872) which says "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

There is no doubt that in connection with matters such as those which have arisen in this case, the burden of proving that there were reasons for not collecting the rent-roll, that those reasons did not involve the possibility of being regarded as gross neglect or misconduct, and that therefore the rent-roll was not sufficiently collected to the proper amount mentioned therein, rests on him who has the best means of proving what he had to do. The case is very like the case of a plaintiff suing for redemption of mortgage upon the allegation that enough money had been realized from the mortgaged property for the purpose of paying off the mortgage by the defendant-mortgagee in possession. Upon whom is it to prove whether such money has been realized? I think I am within the case-law when I say that the Privy Council have ruled that in such a case the burden of proof lies upon the mortgagee to furnish accounts, and that in the absence of accounts the presumption is against the mortgagee for resisting the redemption. Now I wish to formulate the exact proposition which I lay down in this case, and it is best expressed in the following words :—

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In a suit under clause s. 93 (*h*) of the Rent Act (XII of 1881) in which a co-sharer claims his share of the profits according to the rent-roll, and the defendant-lambardár pleads that the actual collections fell short of the rent-roll, and states the reasons for such non-collection, the plaintiff proving the rent-roll has produced enough evidence to furnish a *primâ facie* presumption in favour of the plaintiff, so as to throw upon the defendant the necessity of proving circumstances which rendered it impossible for him to collect the rents from the tenants according to the rent-roll.

This statement of the rule which I lay down only modifies the rule in *Dhanak Singh* v. *Chain Sukh* (1) but is not in full discord with it. With these observations I would return the case to the Bench which made the reference.

STRAIGHT, J.—From the course the argument of this reference took at the hearing, it becomes unnecessary to discuss the question of with which party rests the burden of proof in a suit of the kind mentioned in the referring order, for Mr. *Abdul Majid*, the learned counsel for the appellant-plaintiff, did not controvert the position that the onus was on his client in the first instance. The contention, however, was that the production and giving in evidence by his client of the *jamabandi* or recorded rent-roll was sufficient to throw upon the defendant-lambardár the obligation of shewing that in respect of so much of the recorded rental as he had not collected he had not been guilty of "gross negligence or misconduct" within the meaning of s. 209 of the Rent Act. In support of this argument Mr. *Abdul Majid* maintained that the facts connected with the collections were specially within the knowledge of the defendant-lambardár, and he should therefore be required to give evidence of them. On the other side, Pandit *Bishambhar Nath* urged that according to all ordinary and well-recognised rules of evidence, a plaintiff who seeks to recover not only "his share of the profits actually collected, but also a sum equal to the plaintiff's share in the profits which, through gross negligence or misconduct the lambardár has ommitted to collect,"

(1) I. L. R., 8 All. 61.

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must give some proof of the gross negligence or misconduct beyond the mere production of the *jamabandi*, and he relied on a ruling of this Court in I. L. R., 8 All. 61.

I have no doubt Mr. *Abdul Majid* rightly conceded that the burden of proof rested in the first instance with his client, and the question that has now opened up, namely, what is enough *primâ facie* evidence in cases of the kind mentioned in the referring order, which, strictly speaking, is not the point referred, is one upon which it is impossible to lay down any rule that will be applicable to all cases, other than in the general terms that where a co-sharer in a suit in the Revenue Court under s. 93 (*h*) of the Rent Act not only seeks to recover his share of the profits returned as collected from his lambardár, but the difference between that amount and the full recorded rental or any portion of such, less deductions which he asserts has not been collected by reason of the gross negligence or misconduct of the lambardár-defendant, he must give evidence of the negligence or misconduct set up by him, the nature and *quantum* of which must depend upon the special circumstances of each case. It would be obviously impossible for me to sketch out for the guidance of the lower Courts the sort of proof for which they should look before fixing gross negligence or misconduct on a lambardár, but we may go so far as to say that the mere production by a plaintiff of the *jamabandi* or recorded rent-roll is not enough. Some remarks have been made by my brother Mahmood in the course of his judgment with regard to the application of s. 106 of the Evidence Act. He has suggested that under the principle enunciated in that section the lambardár has special means of knowledge, and he is the only person who has such means of knowledge, and that other co-sharers have no such opportunity. As far as I have been able to ascertain or am aware, every co-sharer has just as good opportunities of getting his information from the patwári of the village, with whom really rests the knowledge of the matters that would go to establish such a case as would entitle a co-sharer to a decree under the Rent Act against the lambardár owing to gross negligence and misconduct. With this expression of opinion, I would return the case to the Division Bench for disposal.

EDGE, C.J.—I agree with my brother Straight that, in a case in which it is sought to charge the lambardár with liability in respect of rents which have not been collected, the mere production and proof of the *jamabandi* is not sufficient *primâ facie* evidence to shift on to the shoulders of the lambardár the onus of proof. I also agree with my brother Straight that it is impossible for us sitting here and dealing with the question in the abstract to lay down any fixed rules as to the quantum of evidence which must be given by a plaintiff in such a case in order to shift the burden of proof on to the shoulders of the lambardár. If the mere production of the *jamabandi* was sufficient evidence to cast the burden of proving that there was no negligence or misconduct of the lambardár on him, we would have to assume that in all cases it was possible to collect the *jamabandi* rent. From my experience of cases in this Court I know that frequently it is impossible to collect the *jamabandi* rent from many causes other than the misconduct and negligence of the lambardár in not collecting it. If the evidence suggested by my brother Mahmood is sufficient, I should like to know why the Court should presume that if the difference arises, it arises through the gross negligence or misconduct of the lambardár and not through the result of the season, the happening of any calamity, or any of the other many causes which might make it impossible to a lambardár, no matter how diligent he might be, to collect the full *jamabandi* rent. To read s. 209 of the Rent Act as my brother Mahmood reads it, would, it appears to me, be to act at variance with all the rules of evidence in cases in which liability is sought to be fixed upon a party on an alleged charge of gross negligence and misconduct of such party. If it was the intention of the Legislature in passing s. 209 of the Rent Act that a lambardár should be made liable on such proof only as that suggested by my brother Mahmood, I should have expected that they would have expressed that intention in language such as this. They might have said that in a suit brought by a co-sharer against the lambardár for his share of the profits, the Court should presume that the lambardár could have collected all the rent shown in the *jamabandi*, and should pass a decree for the plaintiff's share against the lambardár,

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unless the lambardár proved that, notwithstanding due diligence on his part, he was unable to collect the rent or some portion of it. But it is not this language or anything like this language that is used in s. 209. The lambardár no doubt in some cases may know or probably does know more accurately the reason why the rent has not been collected than a particular co-sharer does. But it would appear to me that if we were to apply s. 106 of the Evidence Act to this case, we would be applying the section in a way in which it was never intended. There are many cases which happen every day in which it might be said that the defendant knows better how to disprove negligence or misconduct than the plaintiff knows how to establish those charges as against him. But I never heard it suggested that in cases of this kind we should apply s. 106. It might be said that if you charge a man with fraud, the fact whether he committed the fraud or not is more within his knowledge than within that of the plaintiff. It might be said that if one employs a veterinary surgeon to attend a sick horse, and the horse died, and the owner of the horse charged such veterinary surgeon with negligence in causing the death of the horse, it was more specially within the knowledge of the veterinary surgeon what the horse died of than it was within the knowledge of the plaintiff. In either of these cases s. 106 of the Evidence Act does not apply. I think it would be introducing a very dangerous principle by attempting to read s. 106 of the Evidence Act into s. 209 of the Rent Act where we find words in the Rent Act clear and specific, and we find that the Legislature does not use in s. 209 the language which would throw the whole burden upon the lambardár. When the Rent Act of 1881 was passed, and indeed when the Act of 1873, in which I think a clause similar to s. 209 of Act XII of 1881 occurred, was in force, there had already been a decision of this Court as to the liability of the lambardár. The effect of the decision was to hold that a lambardár is not liable for the rent which he without any wilful default on his part has never received, if he shows that he has done his duty in endeavouring to collect the same: *Inayat Husain* v. *Ghulam Ali* (1). I make this reference

(1) N.-W. P. H. C. Rep. 1867, p. 276.

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because we must assume that when s. 209 as it appears in Act XII of 1881 was drafted, the framers of the section would have looked at that authority of this Court with regard to the liability of the lambardár, and could, if it was desired that that authority should be followed, have drafted s. 209 on the basis of the judgment in that case. For these reasons I am of opinion that the mere proof of the *jamabandi* is not sufficient evidence to warrant a decree against the lambardar for the uncollected rents on the ground of misconduct or gross negligence.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I also concur with the learned Chief Justice and my brother Straight.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

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SETH CHAND MAL AND ANOTHER (DECREE-HOLDERS) *v.* DURGA DEI AND OTHERS (JUDGMENT-DEBTORS).

Execution of decree—Question for Court executing decree—Appeal—Separate suit—Legal representative—Claim by legal representative to property as his own independently of deceased judgment-debtor—Jus tertii—Civil Procedure Code, ss. 234, 244 *(c)*, 248, 278.

Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under s. 244 (*c*) of the Civil Procedure Code must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after, the decree. Under the last paragraph of s. 234, the Court executing the decree may try and determine the question whether property in the legal representative's hands formed part of the deceased judgment debtor's estate, and finds this fact for the purpose of bringing the property to sale in execution, and giving the auction-purchaser a good title under the sale; and the Court's order is subject to appeal but not to a separate suit under s. 283.

Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor, he cannot set up a *jus tertii*, so as to come in under s. 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that,

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although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit.

So *held* by the Full Bench, Tyrrell, J., dissenting.

Held by Tyrrell, J., *contra*, that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge or satisfaction of the decree, but in his personal character independent of the suit and decree, and prefers a claim under under s. 278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings.

Observations by Straight, J, as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as practicable, in accordance with the same procedure as that adopted in regular suits.

Rajrup Singh v. *Ramgolam Roy* (1) approved. *Abdul Rahman* v *Muhammad Yar* (2) and *Awadh Kuari* v. *Raktu Tiwari* (3) overruled. *Bahori Lal* v. *Gauri Sahai* (4) distinguished.

The facts of this reference to the Full Bench are stated in the judgment of Straight, J.

Mr. *G. E. A. Ross* and Pandit *Sundar Lál*, for the appellants.

The Hon. Pandit *Ajudhia Nath*, for the respondents.

STRAIGHT, J.—These two execution first appeals involve very important questions of procedure which have been the subject of many conflicting decisions, and upon which it is most desirable that there should be uniformity of authority for the guidance of the Courts below and for the information of those whose business it is to advise litigants within our jurisdiction. I therefore am constrained at some little length to enter into, *first*, the facts out of which these two appeals from orders before us have arisen, and *secondly* the authorities of which I have spoken, which, at any rate so far as this Court is concerned, are in conflict.

It appears that a decree was obtained against a person of the name of Ajudhia Prasád. It was a simple money decree, and, before

(1) I. L. R., 16 Calc. 1.
(2) I. L. R., 4 All., 190.
(3) I. L. R., 6 All., 109.
(4) I. L. R., 8 All., 626.

it could be executed, he died. In execution of the decree certain properties were attached and notice was issued to the respondent Musammat Durga Dei, in her own person and as guardian of her minor sons, to appear in the execution proceedings and show cause why the decree should not be executed against them in that character. For the purposes of the case, it may be taken that there were six properties attached. As to three of these properties, a particular title was set up by way of objection on the part of Musammat Durga Dei and her minor sons, and as to three of them, it was alleged that those properties had been acquired by her out of her own funds, wholly independent and apart from any inheritance from her husband. In other words, the assertion of the objectors was :—These properties which you have attached are not the properties of the deceased judgment-debtor, but are our properties. In the course of these proceedings Musammat Durga Dei took no objection that she had been improperly brought into them as the representative of the deceased judgment-debtor, nor was it suggested that her minor sons for whom she appeared as guardian had also been improperly cited. The matter went on. Inquiry such as it was, was made, and in the result the Subordinate Judge found that, as to three properties, the objection was a good one and should be sustained, and that they should be exempted from attachment; and as to the three other properties he held that the objections were not sustained, and that the attachment as to them should be maintained. It will thus be seen that there were two grounds of complaint in the order of the Subordinate Judge, one at the instance of the decree-holders, the other at the instance of the objectors, and this is the way in which we have before us two appeals. Appeal No. 93 of 1887 is the appeal by the decree-holders against the allowance of the objectors' objections. Appeal No. 140 of 1887 is the appeal by the objectors against the portions of their objections which were disallowed. The first appeal, No. 93 of 1887, when it was called on to be heard, was met by a preliminary objection on the part of Pandit *Ajudhia Nath*, an objection that, we are told, would have been repeated in the other appeal had it been called on, to the effect that the proceeding between the parties in the matter of objections

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was one which must be regarded as an objection of a person other than the representative of a deceased judgment-debtor; that the order passed upon it must be regarded as an order passed in favour of, or against a person who has objected on his own account to the attachment of certain property in execution of a decree against the judgment-debtor; and the argument of the learned pleader in first appeal No. 93 of 1887, for the respondents, was that under the circumstances the order of the Subordinate Judge was a final order; that no appeal could be preferred from that order to this Court; and that the remedy of the decree-holders, if they had any, was a separate suit for the purpose of having it declared that they were entitled to bring to sale those properties, in respect of which the objections of the respondents had succeeded. The same objection applies to the other appeal, and therefore we must deal with the two cases together, and dispose of them by a single judgment.

We have had the great advantage of hearing the matter most fully discussed by a very learned pleader, who has placed before us all the materials that will enable us, I hope, to come to what will be a unanimous decision upon this extremely vexed and difficult point. The question resolves itself into this :—Where a judgment-debtor dies after a decree passed against him, and his legal representatives are brought into execution proceedings to represent him in respect of the decree, are questions which they raise, as to property which they say does not belong to his assets in their hands and as such capable of being taken in execution of decree, questions in execution, which must be determined in the execution department under s. 244 of the Code of Civil Procedure between the decree-holder and them as representatives of the deceased judgment debtor? Now, no doubt the principal authority to which reference has been made in dealing with the case is that of their Lordships of the Privy Council, to be found in *Chowdhry Wahid Ali* v. *Musammat Jumaee* (1). It has, however, rightly been said, I think, by Pandit *Ajudhia Nath*, for the respondents, that this ruling must not be carried beyond the scope of the precise question that was before their Lordships, namely, whether under Act XXIII of 1861, s. 2,

(1) 11 B. L. R., 149; 18 W. R. 185.

the word "*parties*" included their legal representatives, as to which their Lordships for the purpose of construing the section held that the term "*parties*" did include "legal representatives." But it must be remembered that this decision was antecedent to the passing of Act X of 1877, and long before the introduction in s. 244 of the Civil Procedure Code of the words "*their representatives*." A distinction has been attempted to be drawn between cases in which persons are made parties to a suit as representatives of the deceased defendant, and where they are brought in subsequent to decree, as legal representatives of the deceased judgment-debtor, and in the course of the argument much stress has been laid upon this circumstance. But upon most careful consideration I have come to the conclusion that no distinction can be drawn in this respect, having regard to the specific language of the Civil Procedure Code. No doubt the ruling of the learned Chief Justice and my brother Brodhurst in *Mulmantri* v. *Ashfak Ahmad* (1) and the ruling of my brother Mahmood and Mr. Justice Oldfield in *Rám Ghulam* v. *Hazáru Kuar* (2) might be distinguished from the present case upon this ground. But I do not think that any such distinction can be properly drawn, and that, whether rightly or wrongly, those who framed the Civil Procedure Code must be taken to have intended to place a legal representative after the decree, upon the same footing as a legal representative before the decree, and that there is no distinction between their positions. As to the position of the legal representative before the decree, it could not be contended that in execution of decree all questions arising between him and the decree-holder could not be and must not be determined. It is not my business to say whether it is a good or right thing that representatives brought in after the decree should be treated upon the same footing, but in my opinion the law contemplates this, looking to the terms of the section. While referring to the rulings of this Court, I think it right to say that this opinion necessarly conflicts with that expressed by me in *Abdul Rahman* v. *Muhammad Yar* (3) and with that expressed by me in

(1) I. L. R., 9 All. 605. (2) I. L. R., 7 All., 517.
(3) I. L. R., 4 All., 190.

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conjunction with my brother Tyrrell in *Awadh Kuari* v. *Raktu Tiwari* (1).

Even if I had not been coerced to the opinion I have now arrived at by a consideration of all the later rulings, I should have thought it right, as the majority of this Court is in favour of the present view, to dissent from it in order to procure uniformity of decision upon the point. I think I have referred to all the rulings of this Court, with the exception of one to which I shall presently refer, and I now turn to the latest ruling of the Calcutta Court which may be said to contain a citation of all the authorities that are to be found upon the question. This is the case of *Rájrup Singh* v. *Ramgolam Roy* (2), and it is a decision by a learned Judge for whose opinion I entertain the highest respect, namely, Mr. Justice Wilson, and in the argument of the case before him and Mr. Justice Macpherson, those learned Judges had all the authorities, including the authorities of this Court. There a decree-holder had in execution of his decree made an application to bring to sale certain property. In the execution proceedings the sons of the deceased judgment-debtor, who had been brought in as legal representatives, objected that they had obtained the estate from their uncle, Mewa Lál, and not from their father, the judgment-debtor, and the Court dealing with the matter in a proceeding in execution of the decree, held that the disputed property should be exempted from sale. Subsequently the decree-holder assigned his interest to persons who were the plaintiffs in the suit, and they prayed in the suit for a declaration that the property in question was liable in the defendant's hands to be attached and sold to satisfy that decree. The Subordinate Judge held that s. 244 of the Civil Procedure Code was a bar to the suit, and he dismissed it. The District Judge reversed his decision and remanded the case for trial. There was an appeal to the High Court at Calcutta upon the ground that the order of the District Judge was wrong, and after fully considering all the rulings upon the point, Mr. Justice Wilson came to the conclusion that the order in the execution department, exempting the property from sale by auction, made between the decree-holder

(1) I. L. R., 6 All. 109. (2) I. L. R., 16 Calc. 1.

on the one side and the legal representatives of the judgment-debtor on the other, who said that it was their property obtained from some one other than the judgment-debtor, was made under s. 244 of the Civil Procedure Code, and consequently barred a separate suit, and that the latter suit could not be maintained.

Now it is obvious that is a direct authority in the present case. In the course of his judgment there Mr. Justice Wilson referred to the case of *Bahori Lál* v. *Gauri Sahai* (1). It is a ruling by my brother Mahmood and myself, and I have taken occasion to refresh my memory as to the circumstances of that case and also as to the discussion which took place between my brother Mahmood and myself before we delivered it. In the case of *Mungeshur Kuar* v. *Jamoona Prashad* (2), Mr. Justice Tottenham in his judgment has pointed out correctly the distinction that is to be drawn between that case, with which my brother Mahmood and I were concerned, and other cases on the subject. The facts of that case were very peculiar, and there was a technical distinction to be drawn in it, and the other cases. I have stated what appear to me to be the important and material rulings upon the question, and if I had to declare in explicit terms the reasoning by which my judgment has been arrived at, I should repeat *verbatim* the language used by Mr. Justice Wilson in *Rájrup Singh* v. *Ramgolam Roy* (3).

Now it seems to me as I said before, that we have got to look to ss. 234, 244 and 248 of the Civil Procedure Code. Under s. 244 what is it that the statute declares ? It says:—" The following questions shall be determined by order of the Court executing a decree and not by separate suit." Now it could never be contended for a moment that if any one of the "following questions" does arise between the parties mentioned in the section and is determined, it is not a positive prohibition to the maintenance of a separate suit. Let us then see what is mentioned in the latter portion of the section, particularly clause (*c*). It runs thus :—" Any other questions arising between the parties to the suit in which the decree was

(1) I. L. R., 8 All., 626. (2) I. L. R., 4 Calc. 603.
(3) I. L. R., 16 Calc. 1.

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passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree."

Now although questions may have arisen as to the extent to which the term "*representative*" in clause (*c*) was extended, I can have no doubt that it contemplates and provides for cases arising in execution between either the representatives of the deceased defendant who become judgment-debtors themselves, or the representatives of the deceased judgment-debtor who have been brought into the execution proceedings subsequent to the decree and subsequent to his death before execution has been taken up. Therefore we have it that the Court executing the decree must determine questions in execution between the decree-holder on the one side and the representatives of the deceased judgment-debtor on the other.

If we look to s. 234 of the Code we shall ascertain what is the scope of the proceedings that may be taken as between the decree-holder on the one side and the representatives of the deceased judgment-debtor on the other. It says :—" The holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased," and as the learned Chief Justice pointed out, under s. 248 of the Civil Procedure Code, when he desires to take these steps he may apply for notice to issue to such person unless he has been cited in former proceedings, and when such notice is issued such person may appear, and if no cause is shown the decree shall be executed. If he does appear and show good cause, he will be entitled to the consideration of the questions provided in the last paragraph of s. 234. The representative of the deceased judgment-debtor may say, "I have no assets." The Court will then proceed to try whether he has any assets. Again, taking a case in which attachment has been issued against property and the representative of the deceased judgment-debtor is brought in the execution proceedings and the representative says :—" The property attached is my property and not the property of the deceased judgment-debtor." Now under the last paragraph of s. 234 a Court may in my opinion proceed to try and determine, aye or no, is the property attached in the part of the estate of the deceased judg-

ment-debtor which has come to his hands. The learned Pandit has urged upon us that it is only *pro tanto* to decide the question, and that it is not a question within s. 244 such as would be a final determination to bar a subsequent suit. I think the Legislature can never have intended this. I think it intended that the task of finding out whether there was property in the hands of the representative of the deceased judgment-debtor was to be left to the Court executing the decree, and that it meant that the Court executing the decree was to find this fact for the purpose of execution for bringing the property to sale and giving the auction-purchaser a good title under the sale; and it could not have been intended, so far as the auction-purchaser was concerned, to leave him open to a subsequent suit at the instance of the representative of the deceased judgment-debtor to have it decided that what in execution had been found to be part of the estate of the deceased judgment-debtor was not a part, and that what was brought to sale had been improperly brought to sale. I have already said that s. 244 gives power to determine questions arising between the decree-holder and the representative of the deceased judgment-debtor, and I think I have pointed out that under the terms of s. 234 arises the very question as to whether a property which had come to the hands of the representative of the deceased judgment-debtor was of the assets of the deceased judgment-debtor or not. It is also to be noticed that the Court has to make the inquiry to ascertain to what extent the assets that have come to the hands of the representative have not been disposed of.

Unless it has full power in the matter to make such inquiry under s. 244 as between the decree-holder and the representative of the deceased judgment-debtor which should have force and binding effect, it seems to me that s. 244 would be shorn of much of its usefulness. My view therefore, after serious consideration, is that the present is a case in which there could have been in the execution proceeding which was before the Court below a proper determination of the question arising between the decree-holder on the one side and the representative of the deceased judgment-debtor on the

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other, of the rights of the one party and the other; that is to say, of the right of the decree-holder to bring the property to sale and the right of the representative of the deceased judgment-debtor to hold on to the property as his own property.

I do not think, when the representative of the deceased judgment-debtor says, in regard to the property which he contends is not the property of the deceased judgment-debtor but is his property, that it can rightly be said that he thereby sets up a *jus tertii*. I think he can only do that as trustee or as representing some character wholly separate from his personal and individual character.

I have only one more word to add. I have always felt and do feel the hardship to which persons may be subjected by this view of the section. But this hardship is principally due to the mode in which execution proceedings are carried out. We are well aware of the fact that they are not conducted by the Courts below with the same care and the same attention to the taking of evidence and in many other respects as is pursued in the trial of regular suits. The law, however, does not contemplate that it should be so. The Courts below would do well to understand that, in these execution proceedings, and more particularly in proceedings such as these which involve the determination of the rights of parties as they arise in proceedings where the legal representative of the deceased judgment-debtor has been brought in, greater care, attention and time should be devoted to them. I wish emphatically to say, having taken this view of the sections of the Code and the authorities I have, that in all these matters the Courts executing decrees and having to try such important questions should do so with the greatest care and with regard to the procedure, so far as it is applicable, that is adopted in deciding questions arising between parties in original suits.

The learned Chief Justice has been good enough to allow me to deliver my judgment in the case first, because the point is one I have felt much anxiety about and interest in for a considerable time. I have long felt much reason to doubt the correctness of

the rulings in *Abdul Rahman* v. *Muhammad Yar* (1) and *Awadh Kuari* v. *Raktu Tiwari* (2), and I have now come to the conclusion that they were wrong. With these remarks I would direct that the appeals be returned to the Division Bench for disposal.

EDGE, C. J.—It appears to me that the intention of the Legislature as regards the question before us may be gathered from ss. 234 and 248 of the Code of Civil Procedure. S. 234 provides that when the judgment-debtor dies before the decree has been fully executed, the decree-holder may apply to the Court which passed it to execute it against the legal representative of the deceased, and that "such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may of its own motion, or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit." It is obvious to my mind that the meaning of the section is that the Court executing the decree would have to decide in such a case whether or not any and what property which was of the deceased judgment-debtor in his lifetime came to the hands of the representative, and further, if any such property came to his hands and was disposed of by him, whether or not it had been duly disposed of.

In order to decide those questions the Court executing the decree would necessarily have to ascertain and decide whether any and what portion of the property against which execution is sought or in respect of the dealings with which by the representative is sought to be made liable in execution, was property which was of the judgment-debtor in his lifetime or was property which was exclusively the property of the representative and had not come to him from the judgment-debtor. I wish to say further, although I am repeating what my brother Straight has already said, that in cases of this kind, I have now no doubt, although I have had doubts upon the question, that we cannot regard a case in which the representative merely asserts that the property against which

(1) I. L. R., 4 All. 190. (2) I. L. R., 6 All. 109.

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execution is desired or in respect of his dealings with which it is sought to make him liable in execution is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as the representative of the deceased judgment-debtor, as a case in which he is setting up a *jus tertii*. Where, however, the representative of the judgment-debtor opposes execution against any particular property on the ground that although such property is vested in him, it is vested in him not beneficially by reason of his being the representative of the deceased judgment-debtor but as trustee or as executor of some one else, then that is a case in which a *jus tertii* is set up, and either party in such a case may have that question of *jus tertii* determined in a separate suit. I have considered the sections of the Code and the cases to which my brother Straight has referred, and I have come to the same conclusion as that arrived at by him.

BRODHURST, J.—I concur.

TYRRELL, J.—I regret that I cannot concur. It seems to me that I should distinguish between the case, on the one hand, of a legal representative of a deceased party to a decree, who contests a question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, and the case, on the other hand, of the same person, when he appears not in his capacity of legal representative, but in his personal character, independent of the suit and decree, and prefers a claim under s. 278 of the Code of Civil Procedure. It is true that this latter claim "is to be heard in all respects as if the claimant or objector was a party to the suit," and in this respect the procedure for the decision of a question raised under s. 244 and under s. 278 of the Code is identical. In both alike the person resisting execution is to be treated by the Court "as if he was a party to the suit." But in the former case—I mean that of a legal representative—the question at issue is radically different from the question to be tried under s. 278. Under s. 244 the legal representative can only, I suppose, raise such objections as would be heard from the mouth of the party he represents; as for example, an

objection that the decree should not be executed in some particular way against the estate of the deceased judgment-debtor. In the other case the objection is that the decree has no operation against certain property purporting to be attached in execution of the decree, for reasons personal to the objector and having no reference to or relevance in connection with the party whom the objector represents in the execution case. In other words, the objection of s. 278 is in no way made for or in representation of any of the parties to the suit in which the decree was passed or on behalf of the estate of a deceased party. On the contrary, it is raised in an interest antagonistic to all the parties and to their representatives as such. It is made in defence of the objector's own estate against claims enforcible only against the estate which he happens to be representing. In this view I cannot see why a person who would unquestionably be entitled to the reliefs and remedies of s. 278 and the connected sections if he were a stranger to the suit, should be debarred from them by the mere accident that he is a legal representative in the execution stage of a suit. It is of course for the public interest that there should be "*finis litium*," but I do not think that this object is happily secured by trying C's title to X in the execution proceedings of a suit between A and B about Y, more especially when it is remembered that the decision binds no one but the person least concerned, that is to say, the decree-holder, the field of strife about the matter in issue being otherwise left open to all the world beside.

I would therefore reply that the order before us was made under s. 280 of the Code of Civil Procedure, and is unappealable.

MAHMOOD, J.—I have arrived at the same conclusions as the learned Chief Justice and my brothers Straight and Brodhurst, because I understand the solitary question before the Bench is whether or not an appeal lies in this case. I understand also, with reference to the order by which the case is before us in the Full Bench, that we are not seized of the whole case. Limiting my judgment thus, all I wish to say will be directed to the question put by the order of reference. I agree in so much of what has

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fallen from my brother Straight in the case that it would be unnecessary to go further and add anything to what has been said as to the peculiar and special circumstances of the case of *Bahori Lal* v. *Gauri Sahai* (1) in which I had the honour of being associated with my learned brother and in which I gave concurrence to his judgment after expressing doubts, as my judgment in the case shows, but which doubts I did not allow to go the length of my dissenting from him, because of the peculiar circumstances of the case. In delivering my judgment in the case, however, I pointed out what at that time was the state of the case-law upon the subject, namely, regarding the proposition which was then before us as, a matter of much doubt, and to those cases may be added the recent rulings of the Calcutta High Court in *Roop Lál Das* v. *Bekani Meah* (2), *Rájrup Singh* v. *Rámgolam Roy* (3), and *Mungeshur Kuar* v. *Jamoona Prashád* (4).

In view of all these rulings, and considering the question that is now before us, I am desirous not to enter into a detailed consideration of the various rulings which have been cited, but I am desirous to lay down what I think is wholly consistent with the judgment delivered by my brother Straight and adopted by the learned Chief Justice and my brother Brodhurst; namely, that the turning point of the queston whether or not an appeal lies in this case is the interpretation of s. 244 of the Civil Procedure Code, and the exact answer to be given with reference to the terms of the first part of the section. Now this, again, of course, takes us back to the provisions of s. 234 of the Civil Procedure Code, and to the provisions of s. 248 of the Code, namely, how far the representative of the deceased judgment-debtor, whether such decease took place before or after the decree, is to be taken as representing the estate for the purpose of executing the decree, irrespective of any further questions being raised in a regular suit. In the case of *Nath Mal Das* v. *Tajammul Husain* (5) I gave expression to the view that where a person was impleaded as a defendant and the decree actually passed

(1) I. L. R., 8 All., 626.
(2) I. L. R., 15 Calc., 437.
(3) I. L. R., 16 Calc. 1.
(4) I. L. R., 4 Calc. 603.
(5) I. L. R., 7 All. 36.

against him, which decree was actually sought to be executed against him, then the judgment-debtor could come in with the plea that the rights which could possibly be affected by the decree or be brought to sale under such decree were the rights which did not extend to his, the judgment-debtor's, capacity of being the holder of an independent *wakf* or trust estate; in other words, I held that a distinction was to be drawn between the capacity of the judgment-debtor as representing his own interest and his capacity as representing an interest which did not vest in him, and which I call a legal *jus tertii*. The ruling, however, will not help the present objection, because here there is no such plea. The plea that is taken is that the judgment-debtor, as a party to the suit, might by dint of a personal objection raise the question that the right to any particular property which is sought to be brought under the operation of the decree of Court, has devolved or come otherwise to the judgment-debtor by a title irrespective of that which belonged to him as judgment-debtor, and therefore the judgment-debtor is entitled in this bifurcated capacity to raise the objection such as might be raised and dealt with under s. 278 of the Code. I think this contention, to use an ordinary colloquial phrase of the English language, would involve the achievement of second innings, namely, that whilst the objections might be raised if the legal representative of the deceased judgment-debtor acted under s. 244 and dealt with under s. 244, similar matters might be reagitated thereafter in a regular suit.

Now I hold that as a sound principle of adjudication the law does not intend that litigation should be prolonged or that there should be no end to litigation. It seems to me that as soon as a person is impleaded in a suit and he objects against the execution of the decree, he is bound so long as he claims in respect of the property, against which execution is sought, a right no other than that which vests in him in his own person, to raise those objections in the execution of decree, and that therefore the matter would be governed by s. 244 and would, as in this case, give a right of appeal, because such questions could not be agitated by a regular suit. I only wish to add that this view is wholly consistent with the

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judgment of the learned Chief Justice and my brother Brodhurst in *Mulmantri* v. *Ashfak Ahmad*, (1) and that judgment therefore has my concurrence.

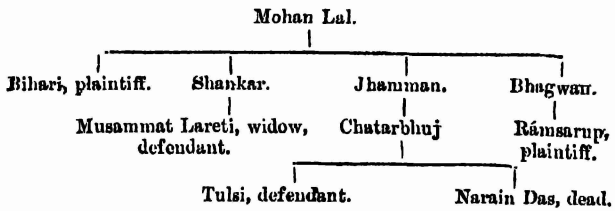
Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

TULSHI RAM AND ANOTHER (DEFENDANTS) *v.* BEHARI LAL AND ANOTHER (PLAINTIFFS).

Hindu Law—Benares school—Mitakshara—Adoption—Power of Hindu widow to adopt—Necessity of express authority of deceased husband—Maxim, quod fieri non debuit, factum valet.

Held by the Full Bench that, according to the Benares school of Hindu Law, a Hindu widow cannot make a valid adoption to her deceased husband without his express authority; that an adoption actually made by her without such express authority is illegal and void; and that the maxim, *quod fieri non debuit, factum valet* is inapplicable to such an adoption.

THE relative positions of the parties in this case are indicated in the following genealogical table :—



It was admitted that the property in suit belonged to Mohan Lál, upon whose death, some time in 1879, the property was inherited by his surviving sons and his grandson Rámsarup (plaintiff) as representing his father Bhagwan, who had predeceased Mohan Lál. Subsequently Shankar died without issue, leaving a widow, Musammat Lareti (defendant), whose name was recorded in respect of her husband's share.

On the 16th of January 1886, the widow, Musammat Lareti (defendant), executed a deed purporting to adopt Tulsi (defendant)

(1) I. L. R., 9 All. 605.

the grandson of Jhamman; and the latter on the same day executed an *ikrarnama*, agreeing to pay Rs. 100 annually from this estate to one Rám Sahai, who was the son of the widow's brother. The deed of adoption was registered on the 10th of February 1886, and the present suit was instituted on the 15th of March 1886, by Bihari Lál and Rámsarup with the object of setting aside the adoption of Tulsi by Musammat Lareti, both of whom were impleaded as defendants in the cause, as also the above-mentioned Jhamman.

The allegations in the plaint were that the deed of adoption of Tulsi, executed by Musammat Lareti (defendant) on the 16th of January, 1886, was the result of fraud and collusion between her and Tulsi's grandfather, Jhamman; that the ceremonies of adoption had not been gone through; that Shankar, the husband of Musammat Lareti, had neither adopted Tulsi nor had he given any permission to the widow to adopt any one; and that even if he had done so the adoption was invalid, as Tulsi was the only son of his natural parents at the time of the adoption.

The suit was resisted upon the ground that Musammat Lareti's husband was separate from his brothers; that she was therefore in separate possession of that share as his widow; that by a testament she had been authorised by her husband to make an adoption "if a second son be born to Chatarbhuj Sahai, and to pay Rs. 100 annually to Rám Sahai; that Chatarbhuj Sahai's son named Narain Das died, and when the other son named Tulsi was born by another wife, the defendant adopted him, and that as the *wajib-ul-arz* gives the females of this family the power to adopt, the adoption is valid."

It was admitted that the parties were governed by the Benares or Mitakshara school of Hindu law.

The Court of first instance (Subordinate Judge of Mainpuri) held that the property was undivided as understood in the Hindu law; that "there is no proof of the fact that the husband gave permission to adopt;" that the transactions of 16th January 1886 were the result of collusion between the widow, Musammat Lareti, and Jhamman; that the adopted son "Tulsi Rám is the only son of his

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father, and it is false that there was any other son who is now dead; that it is not fully proved that all the adoption ceremonies were gone through;" that the entry in the *wajib-ul-arz* could not abrogate the Hindu law; and that even in the case of *Sudras* the permission of the husband was an essential condition precedent to the validity of adoption by the widow after his death. Upon these grounds the first Court decreed the claim, setting aside the adoption.

Upon appeal the lower appellate Court (District Judge of Mainpuri) agreeing with the first Court, held (without deciding whether the property was joint or divided) that no permission was ever given by Shankar to his widow, Musammat Lareti, to make a posthumous adoption; that such permission was absolutely necessary to validate such an adoption as that of Tulsi; that the entry in the *wajib-ul-arz*, "as it does not state expressly that the widows can adopt *without permission*, should be construed in accordance with the ordinary rule of Hindu law by supplying the words *if authorised by the husband.*"

Upon these grounds, the learned Judge, without considering the question of collusion and fraud, dismissed the appeal. The defendants appealed to the High Court on the following grounds:—

"1. That the permission of the husband was not necessary to make the adoption sought to be set aside.

"2. That a good and valid authority to adopt a son has been established.

"3. That in any case the adoption cannot be absolutely void, and the plaintiffs have got no cause of action to maintain the present suit."

The appeal came for hearing before Straight and Mahmood, JJ., who made the following order of reference to the Full Bench:—

STRAIGHT, J.—There can be no doubt that the two questions raised in this appeal are of very grave importance, and their decision involves very considerable difficulty. These two questions are:—

Firstly,—Whether an essential condition precedent to the making of a valid adoption by a Hindu widow is an authority from her deceased husband to make it?

Secondly,—Whether a valid adoption can be made of an only son of another?

The Hindu law bearing upon these two points is not altogether clear, and it is difficult to reconcile some of the decisions with the original texts, to which we have been referred by Mr. *Sundar Lál* on behalf of the defendants-appellants. In the case of *Chowdhry Padam Singh* v. *Koer Udaya Singh* (1) which was a decision of their Lordships of the Privy Council on an appeal from a decree of the Sadar Diwani Adalat of these Provinces, Sir James Colvile in the course of his judgment remarks:—"In order, therefore, to establish the validity of the adoption in this case, it was necessary for the appellant to prove first the authority given by Hem Singh to his wife to make the adoption, and second the actual adoption."

On the other hand, the commentary of the *Viramitradaya*, at page 115, quoted by Mr. *Sundar Lál*, reciting the passage from Vasishta, which is said to embody the Hindu law on the question, the criticisms of Mr. Mandlik, in his well-known work at pages 462-465, the paragraph of the *Vyavastha Chandrika*, Vol. II, pages 19 and 38, and the summary of Dr. Jolly in his book upon the Hindu law of Partition, Inheritance and Adoption, page 304, all give much colour to the contention set up by the defendants, namely, that a valid adoption may be made by a Hindu widow to her deceased husband without any authority from him. We are informed by Pandit *Ajudhia Nath*, that in S. A. No. 35 of 1888 (*Beni Prasád* v. *Hardai Bibi*), which is pending in this Court, this same question is involved, and it seems to us to be one of such importance that it should be considered and determined by the Full Bench.

As to the second point involved, *viz.*, as to whether an only son can be the subject of an adoption, there is no doubt that a Full Bench of this Court in the case reported in I. L. R., 2 All. 164, has held in the affirmative. I confess with the most profound respect

(1) 12 Moo. I. A., 350.

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for the majority of the Judges who so decided, that I have always, since I came to have any acquaintance with Hindu law, entertained serious doubts as to that judgment being in accordance with that law, and as it is not a unanimous judgment of the whole Court and as my doubts about its accuracy are shared by my brother Mahmood, I think it would be well if the Full Bench should at least have an opportunity of determining whether it is prepared to reconsider the question so determined by the former Full Bench, and if so, it can then determine it.

Under these circumstances, and with these observations, I refer the second appeal No. 2067 of 1886, to the Full Bench.

MAHMOOD J.—I agree entirely.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lál*, for the appellants, cited the following authorities:—*Vasistha Smriti*, chap. XV, verse 5, at p. 75 of Dr. G. Buhler's translation (Sacred Books of the East, edited by Prof. Max Müller, vol. xiv, p. 75); *Viramitradaya*, translated by Golap Chandra Sarkar Shastri, pp. 115 and 116 (ed. 1879); Mandlik's Hindu Law, pp. 462—466; Stokes' Hindu Law Books, p. 415; *Dattaka Mimansa*, sec. I, paras. 15, 16, 17, 18 (Stokes, p. 534); *Dattaka Mimansa*, sec. IV., para. 12 (to show that Nanda Pandit was inconsistent in holding that a childless Hindu widow had an implied authority to give away in adoption, but not to adopt); *Dattaka Chandrika*, sec. I, paras. 31 and 32 (Stokes, p. 636); *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy* (1); *Ganga Sahai* v. *Lekhraj Singh* (2); *Ramji* v. *Ghaman* (3); *Giriowa* v. *Bhimaji Raghunath* (4); *Giridhari Lall Roy* v. *The Government of Bengal* (5); *Muni Rám Kohta* v. *Kerij Kolitany* (6); *Hanuman Tiwari* v. *Chirai* (7); *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (8).

Pandit *Bishambhar Nath* and Munshi *Kashi Prasád*, for the respondents, cited the following authorities:—Mayne's Hindu Law (ed. 1878), para. 99, pp. 91, 92; West and Buhler's Hindu

(1) 12 Moo. I. A., 397.
(2) I. L. R., 9 All., 253.
(3) I. L. R., 6 Bom., 498.
(4) I. L. R., 9 Bom., 58.
(5) 12 Moo. I. A., 448.
(6) L. R., 7 I. A. 115 at p. 153.
(7) I. L. R. 2 All., 164.
(8) L. R., 5 I. A., 40.

Law (ed. 1884), pp. 958, 959; Macnaghten's Hindu Law, pp. 90, 100, 155, 182; Colebrooke, vol. iii, p. 322, para. 3; Strange's Hindu Law (ed. 1864) pp. 78, 79; Tagore Law Lectures, 1883, by Dr. Jolly (ed. 1885), chapter iii, pp. 303, 304; Norton's Leading Cases on the Hindu Law of Inheritance, part I, pp. 84, 85; Preface to *Dattaka Mimansa* by J. C. Sutherland (ed. 1834), para. 3, pp. 3, 4; Stokes' Hindu Law Books, p. 664; *Viyavastha Chandrika* (Shama Charan Sirkar) vol. ii, p. 38; J. S. Siromani's Commentary on Hindu Law (ed. 1885), pp. 117, 118; *Viyavastha Darpan* (Shama Charan Sirkar) ed. 1859, vol. i, pp. 868 (para. 508), 870; *Dattaka Mimansa* (J. C. Sutherland), ed. 1834, p. 4; Colebrooke's Digest of Hindu Law (ed. 1865), vol. ii, p. 388; *Rája Shumshere Mal* v. *Rini Dilraj Konwur* (1); *Rája Haimunchul Singh* v. *Koomer Gunsheam Singh* (2); *Jairam Dhani* v. *Musan Dhani* (3); *Chowdhry Padam Singh* v. *Koer Udaya Singh* (4); *The Collector of Madura* v. *Mooltoo Rámalinga Sethupathy* (5); *Thakoor Oomrao Singh* v. *Thakoranee Mahtab Koonwer* (6); *Gournath Chowdhree* v. *Arnopoorna Chowdhrain* (7); *Narayan Babaji* v. *Nana Mánohar* (8); *Vellanki Venkata Krishna Rao* v. *Venkata Ráma Lakshmi* (9); *Bawani Sankara Pandit* v. *Ambabay Ammal* (10).

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lál*, for the appellants, in reply, cited *Vyvastha Chandrika*, vol. i, preface, p. xxii; vol. ii, pp. 40, 55 *(note)*; Tagore Law Lectures, 1883, p. 305; Elberling's Hindu Law, p. 16, para. 30; Morley's Digest, vol. I (*a*), Introduction, p. 205; Norton's Leading Cases on Hindu Law, vol. I, p. 86.

MAHMOOD, J.—The main points in the case are stated in my learned brother's order of reference to be the following:—

(1). Whether an essential condition precedent to the making of a valid adoption by a Hindu widow is an authority from her deceased husband to make it?

(1) Calc. S. D. A. vol. ii (1812-1819), p. 169.
(2) 2 Knapp, 203; Suth. P. C. Judgments, vol. i, p. 4.
(3) Calc. S. D. A., 1830, p. 3.
(4) 12 Moo. I. A., 350, at pp. 356, 357.
(5) 12 Moo. I. A., 397, at pp. 436, 437.
(6) N.-W. P. H. C. Rep., 1868, p. 103 *a*, at pp. 103 *k*, 103 *l*.
(7) Calc. S. D. A., 1852, vol. viii, part. I, p. 332, at pp. 333, 334.
(8) 7 Bom. H. C. Rep., 153, at p. 170.
(9) L. R. 4 I. A., 1, at p. 10.
(10) 1 Mad. H. C. Rep., 363.

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(2). Whether a valid adoption can be made of an only son of another?

It is to these two questions that I shall presently address myself. But before doing so I wish to premise that notwithstanding the ruling of a Division Bench of the Calcutta High Court in *Raj Coomar Lál* v. *Bissessur Dyal* (1) I entertain considerable doubts as to the soundness of the view which seems to have been adopted by both the Courts below, that the literary caste of *Kayesths* in this part of the country, to which the parties belong, falls under the category of *Sudras*, as understood in the division of mankind in the Institutes of Manu, or elsewhere in authoritative texts of the Hindu law. The question is one of considerable difficulty, not only ethnologically, but also from a legal point of view, so far as the administration of the Hindu law to this important section of the population is concerned. I do not take the question to be settled by any adjudication of the Lords of the Privy Council, either in *Sri Narayan Mitter* v. *Sree Mutty Kishen Soondoory Dassee* (2) or in *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (3), in both of which the cases referred to adoption by *Kayesths* of Lower Bengal, who may be distinguishable from the *twelve* castes of *Kayesths* in Upper India, such as the North-Western Provinces and Oudh. Nor do I think that the unreported decision of the learned Chief Justice and my brother Tyrrell in *Chaudhri Hazári Lál* v. *Bishun Dial* (First Appeal No. 113 of 1886, decided on the 15th of June 1887), which was also an adoption case, settles the question. But I need not pursue the subject any further since, both in the Division Bench and in the argument addressed to the Full Bench on either side, I fully understood it to be conceded that this case was governed by the ordinary rules of the Hindu law of adoption, and that the nationality or caste of the parties did not affect the two main questions which my brother Straight enunciated in his order of reference which I have quoted. In this manner I shall deal with the case, and, I think, I may conveniently say here in passing that I agree with the

(1) I. L. R., 10 Calc. 688. (2) L. R. I. A. Sup. Vol. 149.
(3) L. R., 7 I. A, 250.

learned Judge of the lower appellate Court in holding that whatever importance may be attached to entries as to custom in the *wajib-ul-arz* as evidence of such custom, they are not conclusive proof, and that in any case express words are necessary to prove any such special custom as would modify the general law, and that in this case the absence of such words in the *wajib-ul-arz* points to the conclusion that the general Hindu law of adoption was not intended to be interfered with as to the widow's power of adoption—an interpretation fully consistent with the manner in which the Lords of the Privy Council treated the *wajib-ul-arz* in *Ráni Lekhraj Kuar* v. *Babu Mahpal Singh* (1), and in *Uman Parshád* v. *Gandharb Singh* (2).

Now the parties to this litigation are residents of the district of Mainpuri, in which the property in dispute is situate, and it is admitted that they are governed by the Benares school of Hindu law, which is sometimes denominated as the Mitakshara school, though of course the authority of the Mitakshara is also recognized in other parts of India. I have considered it necessary to state this at the outset, because in dealing with the difficulties of law which the facts of this case have produced, constant references will have to be made to schools of Hindu law other than the Benares school.

Viewing the case thus, by far the most important question of fact upon which both the Courts below have concurred is that the deceased Shankar had never authorised his widow, Musammat Lareti, to make a posthumous adoption, and I hold that this finding of fact cannot be disturbed in second appeal. And because this is so, the first question enunciated by my brother Straight in his referring order becomes the turning point of decision in this case, namely, whether, in the absence of authority by the husband, the widow of a childless Hindu, acting on her own behalf, can make a valid adoption. This very question of law arose in the case of *Ganga Sahai* v. *Lekhraj Singh* (3) in which I had the honour of being associated with my brother Straight, who approved of my

(1) L. R., 7 I. A. 63. (2) L. R., 14 I. A. 127.
(3) I. L. R., 9 All. 253, see p. 274.

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judgment in that case. The question was not then decided because my learned brother and I were agreed that upon the evidence in that case the *factum* of the adoption was not proved, and if I mention the case now, it is principally with a view to avoid repetition of what I said in that case upon points, or rather steps of reasoning, which are common to this case and the case which I have mentioned.

The exigencies of this case, however, as I have already stated, require the decision of the question ; and in deciding it, so far as I am concerned, it will be most convenient for me to make constant references to the printed report of my judgment in *Ganga Sahai* v. *Lekhraj Singh* (1) to furnish the steps of reasoning which have led me to the conclusion at which I have arrived in this case.

Perhaps the first point which I should dispose of is that pressed on behalf of the appellants to support the adoption of Tulsi by Musammat Lareti in the argument that, even if the adoption was made without permission of the widow's husband, and even in the absence of the permission or consent of the *sapindas* of the deceased husband, the fact that an actual adoption has been made by the widow is sufficient to validate such adoption by reason of the doctrine of *factum valet* as understood in the Hindu law of adoption. This was one of the questions which I had to deal with in *Ganga Sahai* v. *Lekhraj Singh* (2), and in summing up my conclusions I said at page 297 of the report :—

"Having so far explained how I understand the general scope of the doctrine of *factum valet*, I proceed to define upon what points of Hindu adoption I would hold it to be inapplicable. Adoption under the Hindu law being in the nature of gift, three main matters constitute its elements, apart from questions of form. The capacity to give, the capacity to take, and the capacity to be the subject of adoption, seem to me to be matters essential to the validity of the transaction, and, as such, beyond the province of the doctrine of *factum valet*. And I may at once say that if any of

(1) I. L. R., 9 All. 253, see p. 271. (2) See pp. 292—297.

these three capacities is wanting in this case, I shall hold the plaintiff's adoption to be altogether invalid."

I still adhere to the views which I thus expressed, and because of such adherence it might have become with me in this case a matter of considerable difficulty to decide how far I could make it possible for me to accept the ruling of the majority of a Full Bench of this Court in *Hanuman Tiwari* v. *Chirai* (1) where it was laid down that the doctrine of *factum valet* applied even to the adoption of an only son under the Hindu law. I say this because in the case now before me it is admitted that at the time of the adoption of Tulsi by Musammat Lareti, he was the only son of his natural parents, and this circumstance alone might have precluded not only the capacity of his parents to give in adoption, but also the capacity of Musammat Lareti, and even of her husband, were he alive, to receive the child in adoption.

I am, however, relieved of the necessity of considering this question, not only because there is still existing the ruling of the majority of a Full Bench of this Court in *Hanuman Tiwari* v. *Chirai* (1) as to the validity of the adoption of an only son, but also because, according to the view which I have taken in this case, I have arrived at the conclusion that the express permission of the husband is absolutely necessary as a condition precedent to the validity of any adoption by the widow subsequent to the death of her husband.

Now, the fundamental reasons upon which the Hindu system of jurisprudence recognizes adoption or affiliation to the extent that it does, were stated by me in *Ganga Sahai* v. *Lekhraj Singh* (2), and at page 300 of the report I stated two texts which form the foundation of the right of adoption itself. I said that one of the two texts was from Manu (chapter IX, section 168) :—

"He whom his father or mother, *with her husband's consent*, gives to another as his son, provided that the donee has no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water."

(1) I. L. R., 2 All. 164. (2) I. L. R., 9 All. at pp. 299-302.

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The other text is from Vasistha (3 Dig., page 242), which is fuller than the preceding one :—

"A son formed of seminal fluids and of blood proceeds from his father and mother as an effect from its cause. Both parents have power to sell or to desert him. But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. . *Nor let a woman give or accept a son unless with the assent of her lord.*"

The supreme authority of both these texts is universally acknowledged in the Hindu law of adoption, and I should have thought that the words "*with her husband's consent*" in the text of Manu, and the clearer words "*nor let a woman give or accept a son unless with the assent of her lord,*" which occur in the text of Vasistha, would leave no room for doubt that the consent or permission of the husband was an indispensable condition to the validity of an adoption by a wife or a widow. But such does not seem to be the case, as is apparent from a note to verse 9, chapter I, section II of the Mitakshara by the celebrated Colebrooke (*Stokes' Hindu Law Books*, page 415). The note says :—

"In regard to a widow's power of adopting a son, there is much diversity of opinions. Vachespati Misra, who is followed by the Maithila school, maintains that neither a woman nor a Cudra can adopt a dattaka or given son, because the prescribed ceremony includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony, and accordingly adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. Nanda Pandita, however, in his treatise on adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, Ballambhatta contends that a woman's right of adopting, as well as of giving a son, is common to the widow and to the wife. This likewise is the opinion of the author of the *Vyavahara-mayukha*; but while he admits that a widow may adopt a son without her husband's

previous authority, he requires that she should have the *express* sanction of his kindred. Writers of the Gaura school, on the contrary, insist on a formal permission from the husband declared in his lifetime."

Such being the divergencies of opinion among the text-writers of the Hindu law themselves, I shall, before referring to the case-law upon the subject, deal first with the Hindu law texts themselves, and in doing so I will, except for purposes of analogy, confine myself to the exact question which arises in this case, namely, the capacity of the widow to *take* in adoption (as distinguished from her capacity to *give* in adoption), for here there is no question that the natural parents of the adopted Tulsi had capacity to *give* him, barring such objections as might arise in consequence of his being an only son—an objection which I have already disposed of with reference to the Full Bench ruling of this Court in *Hanuman Tiwari* v. *Chirai* (1).

The question being thus limited to the capacity of the widow to *take* in adoption without the permission of her husband, the most important authority relied upon by the learned Pandit *Ajudhia Nath* is the *Viramitradaya* of Mitra Misra—a commentary on the *Mitakshara*, undertaken apparently with a deliberate intention to uphold the authority of the *Mitakshara* by answering the objections which were raised and enunciated by the conflicting school of inheritance as represented by the *Dayabhaga*. The author referring to the text of Vasistha, "*let not a woman give or accept a son unless with the assent of her husband,*" which I have already quoted, goes on to say in a somewhat polemical spirit:—

"Some say that the adoption of a son by a woman without the assent of her husband being prohibited in this text, the son taken by a widow whose husband died without giving authority, does not become an adopted son. This is not tenable, since a sonless person has no access to heaven, and the procreation of a son is ordained to be necessary. Therefore the permission which he was bound under the Shastras to give is not to be considered as wanting

(1) I. L. R., 2 All. 164.

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in such a case. Nor can it be said that thus the portion, namely, '*unless with the assent of her husband*' would be useless, inasmuch as there is no case to be excluded, and as the authority which a person is bound under the Shastras to give is in all cases necessary (and so assumed as given). Because the prohibition is levelled against a woman who wishes to adopt a son for her own sake when her husband, who is desirous of having *maksha* or freedom from the necessity of repeated deaths and births, or who has a son by another wife, cannot possibly give an authority to adopt ..... But when the husband is dead the assent of those only is necessary on whom she is dependent. In this view the object of the prohibition becomes reasonable. *Therefore, although the husband be deceased without giving permission to adopt, still an adoption by the widow is not invalid.*" (Gopal Chandra Sarkar's translation of the *Viramitradaya*, pp.115-16).

Beyond verbal difference the same is substantially the effect of the translation of the passage made by Mr. Mandlik in his commentary on the *Mayukha* (at pp. 463-64) in his work on Hindu law. I have cited this passage first, as is covers the whole ground of the argument adressed to us by Pandit *Ajudhia Nath* on behalf of the appellant, and also because the *Viramitradaya* is relied upon by the learned Pandit as possessing quite as high an authority, if not greater than the *Dattaka Mimansa* of Nanda Pandit (*Stokes' Hindu Law Books*, page 531), in the Benares school of Hindu law. There can be no doubt that the passage cited is in direct conflict with the rule laid down by Nanda Pandit in his *Dattaka Mimansa*, to which I shall refer later on; but meanwhile it is more than interesting to ascertain the exact authority of the *Viramitradaya*, on which so much emphasis has been laid on behalf of the appellants. The origin of the book is well described by Shama Charan Sirkar in his *Viyavastha Chandrika*, Vol. I, p. 17 of his preface, in a foot-note. The learned author says :—

" The *Viramitradaya* was composed by Mitra Misra by the direction of Rája Vira-Sinha, whence the book is styled *Viramitradaya*. The age of this work appears to be less than four hundred years

as Raghunandana, the author of the *Smriti-tattwa*, who flourished in Nuddea about four hundred years ago, has been cited therein. The object of Mitra Misra's writing this work appears to have been with a view to re-establish or confirm the doctrines of the *Mitakshara* or of the Benares school, many of which were refuted by *Jimuta-Vahana*, who was supported by Raghunandana and the other writers of the Bengal school; but Mitra Misra, reasoning on the arguments of *Jimuta-Vahana* and the rest with great accuracy, has generally refuted their doctrines and confirmed those of his master, *Vijvaneshwara*. *Viramitradaya* is the work of a great logician, and may be regarded as a complete Digest of the *Dharmashastra* of the Benares school, in which the author has generally expounded the doubtful passages, and supplied the deficiencies of the *Mitakshara*, and expressed what was left therein to implication."

That the *Viramitradaya* is an authority in the Benares school cannot be doubted. In *The Collector of Madura* v. *Moottoo Rámalinga Sathupathy* (1) their Lordships of the Privy Council refer to the work (*vide* p. 438) as "a treatise of special authority at Benares," and in *Giridhari Lál Roy* v. *The Bengal Government* (2) they more specifically say that "their Lordships have no doubt that the *Viramitradaya*, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the *Mistakshara*, and declaratory of the law of the Benares school,"—*a dictum* in keeping with the importance which their Lordships attached to the book in *Muni Rám Kohta* v. *Kerrij Kolitany* (3).

The *Viramitradaya* must therefore be regarded as a work of high authority in the Benares school of Hindu law, but it is equally certain that the *Dattaka Mimansa* of Nanda Pandit is also a very high authority in that school, especially upon questions of adoption, which it treats more comprehensively than any other work of that school of law. The authoritativeness of the book, so far as the Benares school is concerned, was fully recognized by the

(1) 12 Moo. I. A. 397. (2) 12 Moo. I .A. 448.
(3) L. R. 7 I. A. 115 at p. 153.

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Lords of the Privy Council in *The Collector of Madura* v. *Mootloo Ramalinga Sathupathy* (1), and I dwelt at some length on the subject in *Ganga Sahai* v. *Lekhraj Singh* (2).

The observations which I then made with reference to the exact authoritativeness of the book have been relied upon on behalf of the appellant in this case for the contention that the work is not one of high authority; but I think it is enough to say that there is nothing in my judgment in that case to shake the authority of the work as a book of reference on the Hindu law of adoption, and that if I declined to accept the interpretation of Nanda Pandit in his *Duttaka Mimansa*, on the particular point then before me, it was mainly because I held that the passage of the *Kalikapurana*, upon which his view of the law was based as to the limit of age for adoption, was in itself not shown to be a genuine text. I may have to refer to this subject again; but meanwhile, as a counterpoise to the text of the *Viramitradaya* which I have quoted, it will be convenient to quote the *Dattaka Mimansa* of Nanda Pandit (section I, verses 15 18), *Stokes' Hindu Law Books*, pp. 534-35, where, referring to the text that adoption may be made "*by a man destitute of a son*," the author's commentary is—

"From the masculine gender being here used, it follows that a woman is incompetent (to adopt). Accordingly *Vasistha* ordains: let not a woman either give or receive a son in adoption unless with the assent of her husband. From this the incompetency of the widow is deduced, since the assent of her husband is impossible. Nor should it be argued that the assent of the husband is requisite for a woman whose husband is living because she is subject to control, but not so the widow, for mention being made of women in general, dependency on control is not the cause and (were it) her subjection to the control of kinsmen exists as shown in the following text:—'*On default of these the kinsmen, &c.*' If it is contended, then, that she may adopt a son with the assent of the kinsmen even, it is wrong, for the term 'husband' would become indefinite, and the purpose would not be attained. Now the purpose of

(1) 12 Moo. I. A. 397. (2) I L. R. 9 All. at pp. 322-324.

the husband's sanction is that the filiation as son of the husband may be complete, even by means of an adoption made by the wife."

There can be no doubt that the effect of this passage is to show that, according to the *Dattaka Mimansa*, a widow, without the prrvious assent of her husband, has no authority to adopt a son to him— a rule which, as I have already said, is directly opposed to the doctrine of the *Viramitradaya*.

But these are not the only original authorities which have been cited on either side, and much reliance has been placed upon works belonging to other subdivisions of the *Mitakshara* law, and there can be no doubt that they may be resorted to for help in determining doubtful questions arising out of the doctrines of the *Mitakshara* itself.

In dealing with this class of authorities, perhaps the best course will be to take those which were cited on behalf of the appellant, and then to cite those relied upon on behalf of the respondent, before considering what resulting effect they may have upon this case.

Pandit *Ajudhia Nath*, on behalf of the appellant, introduces these texts by reading a passage from Mr. Mandlik's Hindu Law, pages 463-65, where that learned author has quoted the original texts and translated them. He says:—

"What the wife may not do, the widow can do; for from the very necessity of the case, after the husband's death, the widow requires no such power from her husband. A text of *Vasistha*,—a female should not give or receive a son except by permission of the husband, which apparently lends colour to the opposite view,—has been so construed by *Gonda* writers that according to their interpretation a widow can under no circumstances make an adoption except with the express *anumati* (permission) of her husband. This, however, is not correct. The text applies to the wife, and not to the widow; and so it has been construed by the *Nibandhakaras* and other writers who are followed on this side of India. Thus *Kamalakara* in the *Nirnayasindhu*, after quoting the above text of

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Vasistha, observes :—This (text applies) where the husband is living, otherwise there will be a contradiction (between this text and) the text of *Vatsa* and *Vyasa* (to the effect that) he is to be known as a given son who is given by his mother or father. *Gift* here is *illustrative* of *acceptance*."

Mr. Mandlik then cites the passage from the *Viramitradaya* which I have already quoted, and he then, referring to that passage as to the widow's power of adoption without her husband's permission, goes on to say :—

Anantadeva in the *Samskara-kausluvha* goes still further. He says :—

"In reality this precept (*viz.*, the text of *Vasistha*, which says that a woman cannot give or receive a son without the command of her husband), should be understood by the intelligent not as a prohibition, but as intended to require a command (of some one) for adoption in the case of a woman who has had no permission from her husband; inasmuch as there can be no prohibition of what has been commanded (as the adoption of a son is), owing to the failure to adopt being declared sinful by the text, there is no higher world for a sonless man, &c.; and inasmuch again as (treating the precept) as a *paryudasa* (a negative proposition) would imply a *lakshana* (metaphorical interpretation"). (Mandlik, page 465).

The other text on which Pandit *Ajudhia Nath* relies is a passage from the *Dattakadarpana*, which Doctor Jolly has translated at pages 304-5 of his *Tagore Law Lectures* for 1883. The extract is the following :—

"The adoption of a substitute for a son should be undertaken by females as well as by males. If it be objected that the incapacity of women to give or receive a son in adoption is shown by the text of *Vasistha*—'Let a woman neither give nor receive a son' (the reply is)—No. The incapacity of women to give or receive a son might be twofold—owing to their incapacity to recite the *mantras* customary on the gift or acceptance of an adoptive son, or owing to the want of the husband's consent. The first reason is not to the purpose,

because a woman, after having merely declared her intention to adopt, might cause the *homa* and all the other ceremonies to be performed by a spiritual guide. Where the person to be adopted is a closely related *sapinda* or *sagotra*, there is no impropriety of any sort, because it is ruled that the *homa* and the other ceremonies may be dispensed with in that case ..... Nor is the second reason correct, because *Vasistha* recognises a right to adopt in women as well (as in men) as he says—'without the husband's permission.' For *Vasistha* does not speak of that incapacity of a woman which is caused by her incapacity to recite *mantras*, but of that incapacity only which is connected with the want of the husband's consent. ..... In accordance with the text 'the father protects her during infancy; the husband protects her when she is grown up; the son protects her in her old age: a woman is never fit to be indepentent;' women whose husbands are living have power to give or take (a son in adoption), not independently, however, but with the sanction of their husband only. Widows, on the other hand, who are destitute of the three, beginning with the son (*i. e.*, son, husband, father), possess an entirely uncontrolled and independent power of giving and taking (in adoption). Only the widow's right of adoption must be held to be confined to the widow of one divided in estate (from his brothers or other co-parceners)."

These texts are in accord with the doctrine of the *Mayukha* (chapter IV, section 5, verse 17, *Stokes' Hindu Law Books*, p. 63), where it says :—

"Therefore, if there must be an order from the husband, it is for a married woman only, as above shown; but for a *widow*, even without it (adoption) may be made with the permission of her father, or, on failure of him, of the relations (*nyati*) under this precept: 'Let a female be taken care of by her father while a child; by her husband when married; and by her sons in her old age. If none of these exist, let her other relations (*nyati*) take care of her. A woman is never fit for independence.' This has been declared by *Yajnavalkya* only with reference to difference of

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age and the circumstances of a woman being under the power of her husband. In case of his being dead, or (unable) from old age or other (disqualification), or from helplessness, then (she is) indeed under the power of her sons or other relatives."

There is no doubt that these texts support the contention on behalf of the appellant, especially as they all bear upon the point of distinction between the *adoptive* powers of a *widow* as distinguished from the wife, that is to say, the powers of a woman whose husband is living.

On the other hand, Pandit *Bishambhar Nath* on behalf of the respondent in supporting the authority of the *Dattaka Mimansa* of Nanda Pandit in the Benares school as to the indispensability of the husband's permission for the validity of a posthumous adoption by his widow, cites two texts which have been translated by Dr. Jolly in his work on Hindu law (*Tagore Law Lectures* for 1883, p. 303). The first of these texts is from the *Dattaka Nirnaya* :—

"Giving or taking a son in adoption is illegal in a woman unless her husband gives his consent to it."

The other text is from the *Dattaka Tilaka* :—

"By 'one sonless,' *i. e.*, by a male destitute of the likeness of a son. Not by a woman, because it may neither give nor receive (a son in adoption) as stated by *Vasistha*: 'Man formed of virile seed and uterine blood proceeds from his mother and his father (as an effect from its cause). (Therefore) both parents have power to give, to sell, and to abandon him. Let him not give or receive (in adoption) an only son. For (he must remain) to continue the line of the ancestors. Let a woman neither give nor receive a son except with her husband's permission.' The right of a woman to adopt with her husband's permission is secondary only; ..... and it must not be said: The mother also has full power to give or receive a son, on failure of the father, because the text 'both parents have power' contains the *dvandva* (copulative) compound (*matapitavan*, 'both parents'), and because it is said 'whom his mother or father give,' &c. (*Manu*, IX, 168), and because each of the two component

parts of a *dvandva* compound is significant by itself. This objection cannot be maintained in the face of the rule that the husband's permission is required. Again, if it be said that here also the equality of rights between both parents is established, the prohibitive rule, 'Let a woman neither give nor receive a son,' would be unmeaning, the female sex being in every way dependent on the male sex, because they must never be independent. And thus says *Harita*,—'In regard to a wife, in regard to wealth, and especially in regard to the sacred law, a woman does not deserve independence, neither in taking nor in abandoning.' *Narada*:—Transactions made by woman are null and void, except during distress, especially if they relate to the gift, mortgaging or sale of a house or field. Such transactions acquire validity in that case only if the husband approves of them, or, on failure of the husband, the son, or on failure of both husband and son, the king.' The term 'during distress' is used (in the text of *Narada*) in order to indicate that a gift or other transaction made by a woman for the purpose of obviating distress, is valid. Therefore a woman even may give in adoption and completely relinquish her dominion over a son in times of *distress*. But she may not receive (in adoption) because the *dvandva* compound, &c., is used with reference to the gift only of a son. Therefore both parents have power to *give*, sell, or abandon from passion or some other motive their son, who is formed of virile seed and uterine blood, and has proceeded from them as an effect from its cause. But they are not (invested with equal power) as regards the *acceptance* (of a son). Although, therefore, a son owes his existence to his mother, she cannot be permitted to adopt a son independently (of her husband), because she is not allowed to give a son in adoption during the lifetime of her husband. Therefore, supposing even a man were anxious to give in adoption his only son, the representative of his race, a woman is not allowed to receive him in adoption."

That these various texts of the Hindu law are in much conflict with each other as to the necessity of the husband's permission for the validity of an adoption by a woman, whether as the wife of a

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living husband or as a widow, cannot be doubted; and the difficulties created by this conflict are considerably enhanced by the circumstance that all the texts quoted belong to the *Mitakshara* school of Hindu law, though their comparative authority is received with varying weight in various subdivisions of the *Mitakshara* school of the Hindu law itself.

Their Lordships of Privy Council had to deal with a similar difficulty in the case of *The Collector of Madura* v. *Moottoo Rámalinga Sathupathy* (1) where, after stating that "the remoter sources of the Hindu law are common to all the different schools," and describing the process whereby these various schools adopted divergent opinions, went on to say :—

"This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of *Vasistha*, which says : '—Nor let a woman give or accept a son unless with the assent of her lord.' But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption; and, therefore, that a widow cannot receive a son in adoption according to the *Dattaka* form at all. The *Bengal* school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death, whilst the *Mayukha* and *Koustribha* treatises which govern the *Mahratta* school explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. *Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.*"

Their Lordships then go on to say :—

"The duty therefore of a European Judge, who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities,

(1) 12 Moo. I. A., 397.

as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

It is in the light of these observations of their Lordships that I shall deal with the exact question now before us, *viz.*, whether a widow can validly adopt without the previous permission of her husband who is no longer alive. I shall consider the question in accordance with the Benares school of Hindu law, which admittedly governs this case; but before doing so I wish to repeat what I have already said, that in the present case there is no question as to the widow's power of *giving* in adoption, but the question is limited to her power of *taking* or *receiving* in adoption.

This being so, the authority of *Manu*, which is supreme in the Benares school, is the first to be referred to. I have already quoted verse 168 of chapter IX of that holy Sage's institutes of law as conferring authority upon the parents to *give* a son in adoption, and in that verse the name of the mother of the given boy is expressly mentioned, though even there the consent of the husband is indicated, giving rise to those divergencies of opinion to which reference has already been made by me. So much as to the authority *to give* in that sacred institute, but as to the authority *to receive*, the important verse is the next, namely, verse No. 169, which runs as follows :—

"He is considered as a son made *or adopted* whom a *man* takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with *the* merit *of performing obsequies to his adopter*, and with *the* sin *of omitting them*."

Now, comparing this passage with the preceding verse, it is remarkable that whilst as to the power of *giving* the mother of the boy *given* is mentioned, in the later verse the wife of the *taker* in adoption is not mentioned, and the text shows that the taking in adoption is entirely dependent upon the wish of the man, *i.e.*, the adoptive father.

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I have no desire to apply to the interpretation of such ancient texts as verses 168 and 169, chapter IX of Manu's institutes the comparatively modern rule of interpretation *expressio unius exclusio alterius;* but at the same time I cannot help feeling it to be very significant that whilst in dealing with the power to *give* the name of the mother of the boy to be given in adoption is mentioned, the text of the following section, which deals with the power of taking a boy in adoption, is totally silent as to the wife of the *man* who adopts. The significance of such silence is all the more increased by the fact that the *Mitakshara* itself seems apparently to draw the distinction between *giving* and *receiving*, so far as the part of the wife is concerned, and is equally silent as to the power of a woman in receiving a child in adoption as distinguished from the part which she may have to take in the transaction of *giving* her son in adoption. Section XI, chapter I, verse 1 of the *Mitakshara*, in describing the twelve kinds of sons recognised by the Hindu law, goes on to say :—

"He whom his father or his mother give for adoption, shall be considered as a son *given*. A son bought is one who was sold by his father and mother. A son made is one adopted by *man* himself."

Now, in this passage again, which really contains definitions of the various kinds of sons, the wife of the *giver* is mentioned, but not the wife of the *taker* in adoption; and the silence is as significant as that in the text of Manu which I have cited. Superadding to the significance of such silence both in Manu and in the *Mitakshara* as to the power or authority of the adoptive mother, is the text of *Vasistha*, which is a *smriti*, and as such of the highest authority in the Benares school, as also in the other schools of the Hindu law. I have already quoted the text more than once, but I think its importance deserves repetition for the purposes of this case, for it lays down in clear language :—

"*Let a woman neither give nor receive a son except with her husband's permission.*" (*Sacred Books of the East*, edited by Max Müller, vol. XIV, p. 75).

This is the translation by Dr. G. Buhler, but since Pandit *Ajudhia Nath* for the appellant, advocated the greater accuracy of Mr. Mandlik's translation of the original Sanskrit, I will quote that also. It is to be found in a foot-note at page 463 of Mr. Mandlik's work on Hindu law, and runs as follows:

"*A female should not give or receive a son except by permission of the husband.*"

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I confess I do not see any substantial difference between the two translations; but Pandit *Ajudhia Nath*, for the appellant, insisted upon Mr. Mandlik's translation being preferred for the sake of the contention that the injunction was only directory and as such capable of being covered by the doctrine of *factum valet*, so far as any want of power in a widow to adopt without her husband's permission might give rise to objection.

Now, if I were to adopt the ordinary rules of interpretation as understood by us in their application to modern law, I should have been inclined to hold that the presence of negative words in either of these two translations of the text of *Vasistha* amount to a specific prohibition rendering that illegal which is done in contravention of such prohibition.

But since the texts belong to an ancient system of law, it is necessary to refer to the authoritative texts of that law itself to interpret the exact meaning of those prohibitions, and in this connection perhaps the best way would be to enunciate as steps of reasoning the following points for consideration :—

(1) Whether, during the lifetime of the husband and the wife, their powers of adoption stand on an equal footing.

(2) Whether, after the death of the wife, the widower can adopt a son irrespective of any permission of his deceased wife.

(3) Whether, after the death of the husband, the widow can *take* in adoption without the previous consent of her hubsand.

Now, the consideration of these questions will lead me to the consideration of some of the doctrines of the Hindu law; but in

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doing so, I shall confine myself to the method of decision prescribed by the Lords of the Privy Council in the passage which I have already quoted from their judgment in *The Collector of Madura* v. *Moottoo Rámalinga Sathupathy* (1) at p. 436 of the Report.

And upon the *first* of these points, I cannot do better than adopt the language of Mr. Mayne's *Hindu Law*, in section 99 of his work, where he says :—

"As an adoption is made solely to the husband and for his benefit, he is competent to effect it without his wife's assent, and notwithstanding her *dissent* [*Dattaka Mimansa*, i. s. 22 ; *Rungama* v. *Atchama* (2)]. For the same reason she can adopt to no one but her husband. An adoption made to herself, except where the *Kritrima* form is allowed, would be wholly invalid : [*Chaudhri Pudum* v. *Koer Oodey* (3)]. Adoptions by women of the dancing girl caste rest on a different footing (see *post*, s. 180). Nor can she ever adopt to her husband during his lifetime, except with his assent (*Dattaka Mimansa*, i. s. 27)."

Upon the *second* of these points also, I think the state of the law is well put by Mr. Mayne in section 96 of his work on *Hindu Law*, and I adopt his views when he says :—

"It has been suggested that an adoption by a bachelor, or a widower, would be invalid, either on the ground that such a person was not in the order of *grihastha* (householder or married man) or that the right of adoption was only allowed where the legitimate mode of procreation had failed. *But it may now be taken as settled that an adoption in either of the above cases would be valid* (Suth. Syn. 664, 671 ; 3 Dig. 252 ; 1 W. McN. 66 ; 2 W. McN. 175 ; *Gunnappa* v. *Sankappa*, Bom. Sel. Rep. 202 ; *Nagappa* v. *Subba Sastry*, 2 Mad. H. C. 367 ; *Chandvasekharudu* v. *Bramhanna*, 4 Mad. H. C. 270)".

The reasons for the conclusion at which Mr. Mayne has arrived are stated in the rest of the section of the work from which I

(1) 12 Moo. I. A. 397.
(2) 4 Moo. I. A. 1 ; S. C. 7 Suth. P. C, 57.
(3) 12 Moo. I. A. 356 ; S. C. 12 Suth. P. C. 1 ; S. C. 2 B. L. R. P. C. 101.

have quoted, and they leave no doubt in my mind that the existence or non-existence of the *wife*, whether in the case of a bachelor or a widower, is wholly unimportant for the validity of Hindu adoption by a man. And it would be prolonging the discussion of this matter if I were to enter upon proving the proposition that in no case, except perhaps that of dancing girls *(vide* s. 180, Mayne's *Hindu Law)* could an adoption be validly made by an unmarried woman. There is indeed no contention that such a thing could be done; and if I have mentioned it, it is with the object of bringing forth a somewhat epigramatic form of the undoubted proposition of the Hindu law, that whilst in the case of a *man* the fact of his having never married or never intending to marry is no bar to his power of adoption, in the case of an unmarried *woman* the simple fact of her being without a lawful husband debars her absolutely from exercising any such right as that of adoption. The power of adopting as I would say, if I were referring to modern law, is a pure creation of "*the Statute*," like the power to appeal from a judgment; but it is not from this method of interpretation that I have any desire to form my opinion upon the question now before me. Yet, apart from any proclivities which I may have as an English lawyer in favour of the recognised rules of interpretation, I cannot help feeling in connection with matters relating to the Hindu law (any more than in matters relating to the Muhammadan law) that the difference between the powers of adoption in the case of a *man* and that of a *woman* is most significant: that this is so, is amply apparent from the authorities which I have already cited; and by analogy of reasoning it becomes all the more significant when it is borne in mind that the adoption of a *female* is not recognized by the Hindu law, and that in one essential at least of the validity of adoption, namely, the proper subject for the exercise of the right, there is no contention that the adopted child must be a *male* and not a *female*.

I have digressed into this analogical reasoning in order to deal with the views expressed by Mr. Mandlik in his work on *Hindu Law*, at pages 466 and 467. The learned author somewhat severely

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criticises the recognized European authorities on Hindu law by saying :—

"It appears to me that some confusion has been created by very loose and indefinite writing regarding the duties of a son and the performance of *Sraddhas*, &c., by the adopted son. Sir T. Strange says :—"The better reason therefore perhaps is that the necessity of a son to celebrate the funeral rite regards the man, rather than the woman, who depends less for redemption upon such reasons; so that whatever a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not her own' (*Elements of Hindu Law*, vol, I, p. 79, 3rd ed.) Mr. Justice Strange goes further and says :—' Unmarried males of whatsoever age, and females, whether unmarried or married, are not in danger of *put*. No adoption on their account is hence necessary; neither would such adoption be valid' (*Manual of Hindu Law*, 2nd ed., p. 18)."

The learned author then goes on to state that the views expressed by Sir T. Strange and Mr. Justice Strange, and commented on by Messrs. Ellis and Sutherland, were equally unsupported by authority, and that (to use the learned author's own words), "all this is a very unsatisfactory mode of stating the *Dharmashastra*," and he ends a whole paragraph by saying :—" This confusion of the mother's position and her necessity as to *Sraddha* has, it appears to me, led to a complete misunderstanding of the whole subject of adoption by females."

The learned author, in thus criticising the conclusions of eminent English Hindu lawyers, states the names of certain rituals prescribed by the Hindu law as to obsequies of the deceased, but he cites no authorities for his propositions on that head, so far as they tend to show that either the necessity or the power of adoption stands upon an equal footing in the case of a *man* and a *woman*. Nor is there any attempt made by the learned author (and I say this with great respect) to explain why throughout the whole Hindu jurisprudence, whether with reference to personal liberty or personal rights, whether with reference to inheritance or succession, whether with reference to powers of alienation of property or other rights which

need not be detailed, the legal powers of the females are not on the same footing as those of the males. There are of course explanations to be found in the sacred texts of the Hindu law itself, which have been carefully investigated by eminent European investigators of the Hindu law to account for the line of thought that under that system a very marked distinction is drawn between the legal rights of a *man* and those of a *woman*; and also that that distinction cannot be also sight of in the case of the right of adoption which would not exist but for express authority of the Hindu texts themselves in that behalf. Any attempt made by modern writers to remove or diminish the efficacy or force of that distinction must necessarily require disturbance or, at any rate, mitigation of the rigour of the Hindu law; and I do not think, as a Judge sitting in this Court, it is within my province to do so.

I will therefore quote a passage from Mr. Mandlik himself, not only because it goes the whole length of supporting the appellants' argument as to the adoptive powers of a woman under the Hindu law, but also because it will be introductory to my dealing with the last but most important question in this case.

Mr. Mandlik, after criticising the English authorities on Hindu law as I have stated, goes on to say:—

"To sum up: a *Sraddha* produces equal benefit to both the father and the mother. When there is a son, he must perform it for both, and does so perform it, as all the *Sraddha* works and our current practice show. If there be no son, a man can follow several ways to get his own salvation, or may adopt a son both for getting his *Sraddha* performed, and for the perpetuation of his name. The same is the case with the man's wife. During his lifetime her identity is sunk in her husband's. After his death she may follow the several ways above indicated for her salvation as well as his, or both follow those ways and also adopt a son who will be her own as well as her husband's son."

These, then, are the views of Mr. Mandlik, and they deserve respectful consideration. The original Hindu authorities upon which those views rest have already been quoted or referred to by

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me in this judgment: and I may say that the authority of Mr. Mandlik himself as a Hindu lawyer would have been of much greater weight and effect with me, so far as this point is concerned, had I found it possible for me to escape the suspicion that, in desiring to raise the adoptive powers of a woman and her spiritual benefits by dint of such adoption, the learned author was more or less influenced by the modern enlightenment of Europe as to the relative 'position of manhood and womanhood.' But I am here to administer not what the Hindu law might be or ought to be, but what the law is, on the old maxim which I hold to be binding upon me even in this class of cases.

What then are the behests of the Hindu law as to the relative position of man and woman in regard to the exercise of legal rights, be they of a temporal or spiritual character? So far as her position in this world, as distinguished from the spiritual world in the future, is concerned, the sacred text of Manu in verse 148, chapter V, is conclusive, and Sir William Jones has thus translated it:—

"In childhood must a female be dependent on her father; in youth, on her husband; her lord being dead, on her son; *if she have no sons, on the near kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign:* a woman must never seek independence."

I have quoted this text *in extenso*, not only because it leaves no doubt that Hindu jurisprudence recognises no equality between man and woman for temporal benefits, but also because the text itself is in no small measure referred to in the authoritative passages which I have quoted, and relied upon as an authority for the proposition that even for such spiritual benefits as may arise out of adoption, the position of woman is far below that of a man, and in no case is it independent of the consent of males.

Perhaps the best way in which I can explain what I have just said is to state the questions which I have put to myself in considering this case, and I will state them in an interrogative form, because I have been unable to find any answer to them in Mr.

Mandlik's well known work on Hindu law, or in any other authoritative treatise on the subject.

First.—It being admitted on all hands that the solitary foundation of the Hindu right of adoption is the spiritual benefit of the adoptor, why is that right available to a bachelor and not to a maid, that is, to an unmarried man and not to an unmarried woman?

Secondly.—In the case of a married couple, why is adoption available to the husband even against the wishes of his living wife, whilst the living wife (even according to Mr. Mandlik) cannot adopt to her husband or even to herself against his wishes?

Thirdly.—Why is a widower entitled to adopt without any reference to the wishes of his deceased wife?

The answer to these questions is of course to be found in the general principles upon which the whole system of Hindu jurisprudence proceeds with reference to the temporal and spiritual position and benefits accorded by that ancient system to womanhood; and I think I may safely affirm that that system nowhere contemplates the spiritual salvation of a woman irrespective of her being married; that is to say, irrespective of the man to whom she is married, and who is throughout the sacred text denominated as her lord and master, furnishing foundation even for such extreme rites as those of *suttee*. "Reprehensible is the father who gives not his daughter in marriage at the proper time." (*Manu*, Chap. IX, verse 4). "If a damsel, yet unmarried, arrive at puberty in the house of her father, he is guilty of infanticide by detaining her at a time when she might have been a mother, and the damsel is held *degraded to the servile class.*" (Text of *Katyayama, Colebrook's Digest of Hindu Law, 3rd edition, vol. II, Page* 297). "The *nuptial ceremony* is considered as the *complete institution* of women, ordained for them in the *Veda*, together with reverence to their husband, dwelling first in their father's family, the business of the house, and attention to sacred fire." (*Manu*, chap. II, verse 67). "When the husband has performed the nuptial rites with texts from the *Veda*, he gives bliss continually to his wife here below, both in season and out of season; and he will give her happiness

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in the next world." (*Manu*, chap. V, verse 153). "No sacrifice is allowed to women apart from their husbands, no religious rite, no fasting, as far only as a wife honours her lord, so far she is exalted in heaven." (*Manu*, chap. V, verse 155).

The last of these texts is of especial importance for the purposes of this case, because adoption is not a temporal transaction but a sacrament or religious rite under the Hindu law, which cannot be performed by a woman irrespective of a husband, for without him she has no spiritual benefits to expect.

The broad outcome of what I have said may be thus summarized :—

(1) A *maid* cannot adopt because she has no husband; but a *bachelor* may adopt though he has no wife.

(2) A *husband* may adopt though his wife does not consent; but a wife cannot adopt if her husband does not give his permission.

(3) A *widower* may adopt without permission from his deceased wife.

So far there is no controversy as to the doctrines of Hindu law of adoption in this part of the country, and the question then remains :—Why should not the same difference between the adoptive powers of a man and those of a woman be maintained in the case of a widow ?

The argument of Pandit *Ajudhia Nath* aims at placing the *widow* on the same footing as the *widower*. The learned pleader, in supporting his case on this point, bifurcated his arguments by contending, in the *first* place, that if a *widower* can validly adopt without the permission of his deceased wife, there is no reason why the *widow* should not make a valid adoption without the permission of her deceased husband. In the *second* place, the learned pleader argued that even if the deceased husband's permission is necessary, it must be taken to be necessarily implied, because an adoption by the widow would be conducive to his spiritual benefits.

Now, so far as the first part of this argument is concerned, I think I have already quoted enough original texts to show the

enormous conflict that exists upon the subject of the widow's power of adoption : but since the learned Pandit on behalf of the appellant has asked us to regard the question as *res integra* and to employ our own judicial reasoning for deducing our conclusions from the principles of the Hindu law of adoption in general, I desire, at the risk of prolixity, to emphasize the extent and complications of such conflict of authority in the various schools of the Hindu law. In doing so I cannot do better than quote a passage from Mr. Mayne's work on Hindu law. The learned author says :—

"Her capacity to adopt to him after his death, whether with or without his assent, is a point which has given rise to four different opinions, each of which is settled to be law in the province where it prevails. All the schools accept as authoritative the text of *Vasistha*, which says :—"*Nor let a woman give or accept a son unless with the assent of her lord.*' But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore that a widow cannot receive a son in adoption, according to the *Dattaka* form, at all—(*Dattaka Mimansa*, 1, s. 16; *Vivada Chintamani*, 74; 1 W. McN. 95, 100; *Jai Rám* v. *Musan Dhami*, 5 S. D. 3). The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death (1 W, McN. 91, 100; 2 W. McN. 175, 182, 183; *Janki Dibeh* v. *Suda Sheo*, 1 S. D., 197 (262); *Mt. Tara Munee* v. *Dev Narayun*, 3 S. D., 387 (516); whilst the *Mayukha Konstubha* and other treatises which govern the *Mahratta* school explain the text away by saying 'that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul." (*Per curiam*, *Collector of Madura* v. *Mooltoo Rámalinga*, 12 Moo. I. A. 435; S.C. 1 B.L. R. (P.C.) 1; S. C. 10 Suth. (P. C.) 17; V. N. Mandlik, 463). A fourth and intermediate view was established by the Judicial Committee in the case from which this quotation is taken, *viz.*, that in Southern India the want of the husband's assent may be supplied by that of the *sapindas*. The doctrine of the Benares

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school, as it prevails in Northern India, appears to be the same as that of Bengal, as to the necessity for the husband's assent; though upon this point a greater difference of opinion has prevailed from the circumstance that the *Viramitradaya*, which allows the assent of the kinsmen to be sufficient, is an authority in that province (*Viramit.* ii. 2 S. 8); W. McN. 91, 100; 2 W. McN. 189; *Shumshere* v. *Dilraj*, 2 S. D. 169 (216); *Haiman* v. *Koomar*, 2 Kn. 203; *per curiam*, *Collector of Madura* v. *Moottoo Rámalinga*, 12 Moo. I. A. 440; S. C. in the Court below, 2 Mad. H. C. 216; 2 Stra. H. L. 92). The result is, that in the case of an adoption by a widow, in *Mithila*, no consent is sufficient; in Western India no consent is required; in Bengal and Benares the husband's assent is required; in Southern India the consent either of the husbands or of the *sapindas* is sufficient." (*Mayne's Hindu Law*, S. 99, 3rd ed., pages 99, 100).

Such being the state of the law, I think it is open to us to adopt the view which seems to us most conformable to the spirit of Hindu jurisprudence, interpreting that spirit with due regard to maintaining consistency between the various precepts which, as I have already explained, draw a marked distinction between the sexes as to temporal rights and spiritual benefits, and place the woman far below the man. This cannot be doubted; and if this is so, it seems to me that in interpreting a doubtful proposition of law, the duty of the Judge is to interpret it so as to obviate the disturbance of harmony between the various doctrines of the same system. In this light, which I think is consistent with juridical principles, I would, even if I were limited to mere ratiocination, hold that it stands to reason that the disability or restrictions which the Hindu law imposes upon woman should apply to her in all the *three* stages of her existence, namely, *maidenhood*, *wedlock* or coverture, and *widowhood*. I would hold thus because the texts of the Hindu law do not expressly state the reasons why any distinction between the two sexes as to the acquisition of spiritual benefits by adoption has been prescribed in the first two stages, and why the same analogy should not be carried on into the third stage, namely, widowhood. It is

not, however, upon mere analogical or abstract reasoning that I would decide such a question; but I do thus decide it because to my mind it furnishes ample reason for preferring the doctrine of the *Dattaka Mimansa* of Nanda Pandit to the doctrine of the *Viramitradaya* of Mitra Misra, these two being the most important authorities in conflict with each other, so far as the Benares school of Hindu law is concerned. I am all the more fortified in this view because, so far as the indispensability of the husband's permission to enable a valid adoption by a widow is concerned, the doctrine of the *Dattaka Mimansa* is consistent, though not wholly coincident, with the *Mithila* and Bengal schools of Hindu law, and even with that of the *Dravida* or Madras school, where the only distinction made is that the consent of the *sapindas* is taken as a substitute for the consent of the husband. The only subdivision of the *Mitakshara* school which dispenses with the necessity of the husband's permission is the *Maharastra* school, which shows preference to the doctrines of the *Mayukha*, and prevailing as it does in the Bombay Presidency, in no small degree accounts for the partiality which Mr. Mandlik, himself a Mahratta Brahmin, and eminent lawyer of Bombay, has naturally shown to those doctrines. That the majority of the schools of Hindu law recognize the indispensability of the husband's permission in some form or other has already been shown by me, and it seems to me that I should be doing nothing more or less than introducing into this part of the country the doctrines of *Mayukha*, that is, the *Maharastra* school, if I were to adopt the whole length of Pandit *Ajudhia Nath's* argument on behalf of the appellant by holding that, for the validity of an adoption in the Benares school, the previous permission of the husband is not an essential condition. I will also later on show that such a course would also disturb the uniform continuity of decision in cases governed by the Benares school.

But before entering into the consideration and effect of modern authorities on Hindu law and reported cases, I wish to deal with the second part of the argument of the learned Pandit on behalf of the appellant, namely, that even if the husband's permission be

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indispensable, it must be taken to be *necessarily implied* because an adoption by the widow would be conducive to his spiritual welfare. In supporting this part of his argument, the learned pleader laid much stress upon analogical reasoning to be derived from the powers of a Hindu widow to alienate the property of her husband for his spiritual benefits under circumstances falling under the category of *legal necessity* as understood in the modern phraseology of Hindu law.

Now, in the first place, this argument, so far as it relies upon the consideration of spiritual benefits to the deceased husband by the widow's act of adoption, seems to me to amount to nothing more than begging the whole question; because if adoption by a widow without her husband's permission is invalid in law, no spiritual benefits can accrue by such adoption to the soul of the deceased husband any more than an alienation invalidly made by a widow can confer any such benefit. The argument therefore does not carry the matter further than where it stood in connection with the first part of the argument which I have already disposed of. An invalid adoption does not affiliate a boy to the adoptive father, and therefore the adopted child can confer no spiritual benefits upon his adoptive father even if the latter had invalidly made the adoption himself, much less when such invalid adoption is made by his widow without his permission.

I do not, however, wish to leave the matter here, because I wish, out of respect for the learned arguments addressed to us on behalf of the parties by the learned Pandits on either side, to state what I consider to be a radical distinction between the powers of a Hindu widow in possession of her husband's estate to alienate his property under legal necessity and her power to make an adoption after his death. It seems to me that the conditions under which alienation, whether by sale, mortgage or otherwise, may be made, form rules of property appertaining to transfer, whilst adoption is not a rule of property under the Hindu law, but a rule of personal *status*. And I may affirm at once that even that ancient system—perhaps the most ancient in the world—does not ignore the broad distinction

between the rules of property and the rules governing personal *status*. And when I say this I must not be understood to be oblivious of the complications which this statement of the Hindu law, if understood unreservedly, might create if it is not borne in mind that under that system slavery was allowed, and also *patria potestas* much in the same manner as among the ancient Romans.

The broad distinction, however, remains that whilst in the case of alienations by a widow the personal *status* of no one is altered; in the case of adoption the personal *status* of a human being, namely, the adopted son, is undoubtedly altered. There can be no analogy between adoption and *legal necessity* justifying a widow to alienate her husband's estate, because adoption may be made without the existence of any property to be inherited by the adopted son, whilst *ex necessitate rei* the existence of the husband's property is a condition precedent to the exercise of the power of alienation by a Hindu widow.

The learned Pandit for the appellant, beyond suggesting a remote analogy, has not cited a single authoritative text to warrant the view that adoption stands upon the same footing as *legal necessity* which would justify a Hindu widow to alienate her husband's estate. If he had pointed out such a text I should have been anxious to call upon the learned Pandit also to point out some text which would maintain the suggested analogy and meet the difficulty of a case in which a husband never intended to adopt, and before death positively *prohibited* his wife from adopting any one, as is often done in the case of property which a dying husband in leaving to his wife prescribes should not be alienated by her.

I have endeavoured in vain to find any authoritative texts which would meet the difficulties which the observations which I have just made suggest: and I cannot therefore help holding that the analogy is unsound. If the argument of the learned Pandit for the appellant were to be carried to its logical extent, a widow may *give* a son in adoption without the permission of her deceased husband, and so may a widow *take* a son in adoption without the permission

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of her deceased husband. So that if the argument is right, two widows, one by *giving* and the other by *taking*, might bring about a valid adoption irrespective of the consent of their respective husbands or even of their *sapindas*. In other words, two widowed ladies might by mutual consent alter the personal *status* of a male human being, involving, as such alteration does, the result that not only in point of the pecuniary benefits of inheritance which the adopted son might have had from his natural father, but also in spiritual respects, he ceases to be the son of his own father, and becomes the son of a man who is no longer alive, who never intended to adopt him, and who never gave any permission to his widow to make any such adoption.

I hold that such a result wholly militates against the fundamental principles of Hindu jurisprudence, because such result would assign to womanhood a temporal and spiritual position enabling the female sex to govern the personal status of a male, both in his temporal and spiritual interests. And I say this with some emphasis, because upon all questions of importance I have long held that the *Smriti* of Manu, which would abhor the spirit of such a notion, is the best guide.

But the learned Pandit goes on to argue that in matters of adoption by the widow there is a necessary implication of her husband's permission, and he contends that the power to *take* in adoption must rest upon the same theory and principle as the power to *give* in adoption. With this hypothesis the learned Pandit has called our attention to the following texts of the *Dattaka Chandrika* (Sec. I, paras. 31 and 32) :—

"But by a woman the *gift may be made* with her husband's sanction if he be alive; or even without it if he be dead, have emigrated or entered a religious order. Accordingly *Vasistha* says :—'Let not a woman either *give* or *receive* a son unless with the assent of her husband.' Now, if there be no prohibition even there is assent : on account of the maxim :—'The intention of another, not prohibited, is sanctioned.' *Yajñavalkyá* suggests the independency of the woman :—'He whom his father or mother *gives* is a son *given*;'

Also in another place : "deserted by his father and mother, or either of them." (*Stokes' Hindu Law Books*, p. 636).

These texts no doubt support the contention as to *implied* authority; but they are opposed to the doctrine of the *Dattaka Mimansa* (section IV, paras. 9, 10 and 11) :—

"'*By a man having several sons.*' Since the masculine gender is here used, the *gift* of a son, by a woman, is prohibited. Accordingly *Vasistha* says :—Let not a woman either *give* or *accept* a son; and (her) independency is not ordained. With the husband's assent, a woman also is competent. Accordingly *Vasistha* adds : 'unless with the assent of her husband.' *Whom his mother or his father gives (dadyat)* : 'his mother or father *give (dadyatam')*. As for what is contained in these passages, as intimating the equality of the father and mother, that is merely with reference to the assent of the husband."

The *Dattaka Mimansa* repudiates the whole doctrine of implied authority as much in the case of *giving* as in the case of *taking* in adoption by a widow; but the learned pleader for the appellant quotes the following paragraph of the same work to show that Nanda Pandit, the author of the *Dattaka Mimansa*, is inconsistent with himself when he lays down (section IV, para. 12) :—

"It must not be argued that thus the gift of her son by a widow, though during a season of calamity, could not take place on account of the impossibility of the assent of her husband, analogous (to her incapacity) to adopt. For by referring to the instance recorded of *Galava*, such gift may be inferred as legal, and the singular number, indicating independence of another, is used." (*Stokes' Hindu Law Books*, p. 573).

Now, whilst I admit that so far as the doctrine of the husband's implied authority is concerned there is conflict between the *Dattaka Chandrika* and the *Dattaka Mimansa*, I confess I can see no inconsistency between the various parts of the rules laid down by Nanda Pandit. He uniformly upholds the indispensability of the husband's permission to validate an adoption by a widow, and he applies it

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equally to the act of the widow in *giving* and her act in *taking* in adoption. The only exception which he mentions is the case of *calamity* or *distress*, when the husband has deserted his child or is dead, and where his permission to *give* his son in adoption is unprocurable.

Now, I have no hesitation in preferring the doctrine of the *Dattaka Mimansa* upon this point also, because it seems to me to be more consonant with the general spirit and fundamental principles of Hindu jurisprudence than the doctrine of the *Dattaka Chandrika* as to the husband's implied authority. Such implication of permission by the husband is based solely upon the theory that adoption by the widow would benefit the soul of the deceased husband. This point has already been disposed of by me as unsound under the Benares school of Hindu law; but even assuming, for the sake of argument, that such permission may be implied in the case of a widow *taking* in adoption, I fail to see how the doctrine of the *Dattaka Chandrika* can be sound when it applies the doctrine equally to the case of a widow *giving* her son in adoption. I am unaware of any authority in the Hindu law which would justify the view that the act of *giving* away a son in adoption is conducive to the spiritual welfare of his father, be he dead or alive. It is thus clear that if this hypothesis of spiritual welfare to the deceased husband applies to the case of a widow *taking* in adoption, it certainly cannot apply to the case of a widow *giving* in adoption, for she might thus be possibly depriving her husband and herself of such spiritual benefits as the Hindu law contemplates by the existence of a son after the death of the parents— that is, the doctrine which is the solitary foundation of the right of adoption under that system.

It is thus that it is not the *Dattaka Mimansa* which is inconsistent with itself but the *Dattaka Chandrika* in so far as it may be understood to place implied authority of the husband on the same footing in the case of *giving* as in the case of *taking*. The *Dattaka Mimansa*, of course, in para. 12, section IV, permits the *giving* of a son by a widow during a season of calamity or distress without

her husband's permission, but this exception is expressly limited to seasons of calamity or distress, and is consistent with what is enunciated in the texts cited by the author in paras. 19 and 20 of the same part of the work, showing that according to *Katyayana* and *Manu*, seasons of distress and calamity stand upon a special footing of their own with reference to the power of *giving* away a son in adoption. This, indeed, is in full accord with the humane element which pervades the whole of Hindu jurisprudence, even where it lays down strict and rigid principles, and in the case of a son being *given* away during a calamity or distress, such as famine, that humanity is shown in the interests of the son and relieves the natural parents of what would otherwise be a sin in them. This is clearly brought out in the *Dattaka Mimansa* (section IV, paras. 19 and 20) :—

"Hence the meaning is this: a gift of a son is to be made in a time of calamity only; not otherwise. Thus *Katyayana* says:— 'But during a season of distress the gift or sale even may be made; otherwise he must not attempt the same. This is the injunction of the holy institutes.' From the context 'of sons and wives,' is understood. *Manu* also :—'Whom his mother or father *give* during distress, confirming the gift with water.' *During distress* :— In a famine, and so forth: should the gift be made, no distress existing, the giver commits a sin on account of the prohibition, 'otherwise he must not attempt the same.'" (*Stokes' Hindu Law Books*, page 575).

These texts then clearly show the reason of the distinction which Nanda Pandit in his *Dattaka Mimansa* makes between the power of a widow to *give* in adoption (in a time of distress) without her husband's permission and her power to *take* in adoption without such permission. The differentiating circumstance is of course the distress and calamity, and who would maintain that a widow is driven to *take* in adoption because of such distress or calamity? The whole argument therefore which has been addressed on behalf of the appellant, so far as it proceeds upon the assumption of inconsistency of Nanda Pandit's rule in the *Dattaka Mimansa*, is fallacious.

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But the learned Pandit on behalf of the appellant pursued the argument further by calling our attention to the text of the *Mitakshara* itself (chap. I, sec. XI, para. 9) and Colebrook's Note the reon :—

"'*Whom his father or mother gives*'. *Medhatithi* reads and interprets 'whom his father or mother *give* :' (inserting the conjunctive particle *cha* instead of the disjunctive *va*). *Balambhatta* condemns that reading; and infers from the disjunctive particle and dual number in the text that three cases are intended, *viz.*, 1*st*.—The mother may *give* her son for adoption with her husband's consent if he be absent or incapable; and without it, if he be dead or the distress be urgent. 2*nd*.—The father may *give* away his son without his wife's consent, if she be dead or insane, or otherwise incapable; but, with her consent, if she reside in her own father's house. 3*rd*.—The father and mother may conjointly *give* away their son if they be living together" (*Stokes' Hindu Law Books*, page 415).

Upon the authority of the views of *Balambhatta* thus expressed, the learned Pandit for the appellant has argued that the conclusions which are to be drawn from the *Dattaka Mimansa*, as I have stated them, are to be overridden. This argument has had my consideration, but I cannot adopt it because, in my opinion, the authority of *Balambhatta* cannot override the ratiocinative conclusions based upon the general spirit and principles of the Hindu law of adoption as represented by the doctrines of the *Dattaka Mimansa* of Nanda Pandit. I should not have said so unless I felt that the authority of *Balambhatta* is not so high as to override such conclusions. At page 17 of their work on Hindu law (3rd edn.), Mr. Justice West and Dr. Buhler state that *Balambhatta* is the *nom de plume* of a lady of the name of Lakshmidevi, who "gives a full and continuous verbal interpretation of the *Mitakshara* accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of *Yajnavalkya* .....Her opinions are held in comparatatively small esteem, and are hardly ever brought forward by the *Sastris*, if unsupported by other authorities."

To these views I cannot help adding the surmise that upon the particular question as to the woman's power to *give* or *take* in adoption *Balambhatta's* latitudinarian interpretation of the *Mitakshara* would naturally tend to favour her sex, and I would therefore regard her views of the law on such questions with great caution. When I say this I must not be understood to contradict what Mr. Shyama Charan Sarkar says at page xvii of his preface to vol. I of his *Vyvastha Chandrika*, to the effect that the work of *Balambhatta*, known as the *Balambhatta-tika*, is an authority in the Benares school, and may be referred to. All that I hold in this case is that I do not regard her authority upon the point now under consideration as higher than that of Nanda Pandit's ratiocinative enunciation of the law in the *Dattaka Mimansa*, to the effect that "the connection of lineage to the father is the filiation as his son; and such filiation proceeds from the sanction only of the father, not from the act of adoption; for the agent of that in this instance is the wife." (*Dattaka Mimansa*, sec. I, para. 19). The exact effect of the preferable doctrine of the Benares school is perhaps best expressed by Mr. Sutherland in the last paragraph of *Head First* of his Synopsis of the Hindu law of adoption (*Stokes' Hindu Law Books*, page 664) :—

"The same reason which imposes the necessity of adoption on a man not equally applying to a woman, the latter—(at least such seems the more accurate and prevailing doctrine)—is incapable in her own right of adoption, though it is admitted that by his sanction she may affiliate on the part of her husband a son who would necessarily be filially related to himself. Nanda Pandit denies generally the authority of the widow to adopt, assigning a reason by no means satisfactory, that the assent of her husband is impossible: but it is reasonable to admit, consistent with practice and the opinion of other authors, the validity of an adoption made by a widow under the sanction of her husband, written or formally expressed during his lifetime, and perhaps in some places under that of kinsmen."

Having so far dealt with the original texts and the reasoning which by analogy or ratiocination might be deduced from them, I

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proceed to deal with the reported rulings of the Courts, as they are, in my opinion, valuable, not only as indicating a long course of decision, but also as indications of the actual law and practice as understood by the population governed by the Benares school. As introductory to those rulings and indicating their effect, I quote the words of Sir Francis Macnaghten, one of the Judges of the Supreme Court of Fort William in Bengal, in his *Considerations on the Hindu Law*, published so long ago as 1824, at page 155 :—

"If a man, not having male issue, shall omit in his lifetime to adopt a son, the widow or widows may, in *pursuance of his instructions*, adopt one after his death. Adoption by a widow or widows, *without instructions from the husband* for that purpose, is mere nullity. This I lay down with confidence as the law. *Vasistha* says : 'let not a woman either *give* or *receive* a son in adoption unless with the assent of her husband.' After the death of her husband the widow is not competent to *give* one of his sons in adoption."

Equally emphatic is the language adopted by Sir W. H. Macnaghten in his *Principles and Precedents of the Hindu Law*, vol. I, p. 100 (edn. 1829) :—

"It is an universal rule in Bengal and Benares that a woman can neither adopt a son nor give away her son in adoption without the sanction of her husband previously obtained."

Perhaps the oldest reported ruling on the subject is Case No. VIII on adoption, printed at page 182 of Sir W. H. Macnaghten's work, vol. II, which was a case from Bundelkhand, and was decided on the 14th April, 1816, and it was there laid down that "a widow is incompetent to adopt a son; and if she has sons she cannot give one of them to any one." The case was governed by the Benares school; but the question relating to the effect of express permission of the husband does not, however, seem to have been considered in that case. The question, however, arose and was decided by the Calcutta Sadar Diwani Adalat in *Rája Shumshere Mal* v. *Rání Dilraj Konwur* (1) which was a case from the

(1) Calc. S. D. A. vol. ii (1812-18 19), p. 169.

District of Gorakhpur, which in 1816 was within the jurisdiction of the Calcutta Sadar Diwani Adalat. It was there clearly laid down that, according to the Hindu law as current in Benares, an adoption made by a widow without authority from her husband is illegal. In that case the answer given by the Pandit is thus stated in the Report (p. 171) :—

"It is written in the *Viramitradaya* and *Sanskar Konstribha* that it is lawful for a widow to adopt a son without authority from her husband, provided she obtain the consent of her husband's heirs; but as this doctrine is overruled in the *Dattaka Mimansa*, a treatise of *greater authority*, the adoption of Partáb Mal, by Ráni Bakht Koer without authority from her husband Rája Bhim Mal, is illegal and invalid under the *Shastras* current in Gorakhpur, and such adoption being illegal, the appellant, as heir of his father Partáb Mal, cannot maintain any claim to the estate in dispute."

The report then goes on to state the authority and reasons upon which the Pandits based their answer :—

"In support of answer first, *Dattaka Mimansa Vasistha* having said 'let not a woman give or accept a son unless with the assent of her lord,' it is evident that a widow cannot, unless with the assent of her husband, adopt a son. It has been argued that this text is applicable solely to women whose husbands are alive, and not to widows, the wife alone being under control of the husband; to this it is answered the word 'woman' is to be taken in a general sense, and applied equally to a widow as to a wife, both being under control, the widow under that of the husband's kindred; to this it is urged in reply that a widow consequently may adopt a son with the assent of her husband's relations; but such a doctrine would be manifestly absurd; for if she could, with the consent of her husband's kindred, adopt a son, the word '*husband*' must necessarily bear the sense of kindred, which it does not; and a son so adopted could not confer any benefit on the deceased husband, being adopted without his consent, whereas a son adopted by a widow with the consent of her husband, is in truth the son of her lord."

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These views were adopted by the Sadar Diwani Adalat, and I have quoted them *in extenso*, as they were the subject of consideration and approved by the Lords of the Privy Council in *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (1). That was a case from the district of Etáwah, which is coterminous with the district of Mainpuri, to which this case belongs, and was therefore subject to the Benares school of the Hindu law. The Pandits of the Zila Court had in that case declared that the authority of the husband was not essential for a valid adoption by the widow; but the Pandits of the Calcutta Sadar Court overruled this opinion, and held that such permission was essential, and this opinion was adopted by the Sadar Court and affirmed by the Lords of the Privy Council on appeal. In dealing with the authorities there cited, their Lordships go on to say:—

"Upon a full consideration of these authorities, their Lordships are of opinion that they cannot come to the conclusion that the decision of the Court below is wrong. According to the native text-writers it seems to be clear that the ancient law of Hindústán required the authority of the husband; but it is also clear that the strictness of that law has been in many districts relaxed or modified by local usage; and the opinion of the *Sastaries*, as published in Mr. Borradaile's Bombay Reports, is very strong to show that in the Mahratta States to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not, in their Lordships' judgment, established; on the contrary, the weight of authority is in favour of the opposite conclusion. The opinion of the Pandits of the Sadar Court, both in this case and the case of Shumshere Mal (appendix, p. 83), and that of the Pandit of the Provincial Court of Appeal of Benares in the latter, appearing to be entitled to more credit than those of the Pandits of the Zila and Provincial Courts of Etáwah and Bareilly, and of the City Court of Benares. Without pretending to decide what is the law in other districts of India, their Lordships feel bound to

(1) 2 Knapp, 203; Sutherland, P. C. Judgments, vol. i, p. 4.

say that in this particular district, upon the authorities brought forward in this particular case, they must pronounce that the law requires the direction of the husband in order to the validity of an adoption; at all events they cannot say that it does not; which they must do in order to reverse the judgment in this case."

Now, I regard this exposition of the law as a distinct authority that even so far back as 1834, when those observations were made, it had never been decided that the authority of the husband was *not* essential to the validity of an adoption by the widow under the Benares school. The effect of the Privy Council ruling was so understood by the learned Judges of the Madras High Court in *Collector of Madura* v. *Muttu Vijaya Ragunada Muttu* (1). Referring to the case the learned Judges say (p. 216) :—

"One other case was quoted for the appellants as a positive decision that in provinces governed by the Benares school of law the express assent of the husband was required, and by the respondents because it admitted the position that this ancient rule had in many places been modified. The case is reported in 2 Knapp, 203. The question arose in the zila of Etáwah, in the North-Western Provinces, subject to the Benares school of law, as we know, both from its geographical situation and from the *Mitakshara* being quoted as an authority, both by the *Pandits* who affirmed and by those who denied the validity of an adoption without the express assent of the husband (page 207 of the Report). The Bengal *Pandits* relied upon the *Mitakshara* and the *Dattaka Chandrika*, and the note of Mr. Colebrooke so often referred to and the passage of Sir T. Strange were quoted in favour of the validity of the adoption. This therefore is an express decision that there are places governed by the Benares school of law in which no assent but that of the husband will be sufficient to validate a widow's adoption .....the materials contained in a case which, coincidentally with this, was before the Sadar Court of Bengal (*Rája Shumshere Mul* v. *Ráni Dilraj Konwur*, II Sadar Dew. 170, 171), were also before the Privy Council. The *Pandits* of the Sadar Court of Bengal quoted the *Viramitradaya*

(1) 2 Mad. H. C. Rep. 206.

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and *Sanskar Konstribha*, works of paramount authority in the special school of Benares, and declared their authority overruled by the *Dattaka Mimansa* of Nanda Pandita. So far, therefore, as the decision goes it is an authority for the paramount weight of the *Dattaka Mimansa* over the treatise specially applicable to Benares, and in a case arising in a zila proximate to Benares itself. Moreover, the case overruled the opinion of Mr. Colebrooke, if that opinion can be supposed to mean that the assent of the husband is not indispensable in countries following generally the doctrine of the *Mitakshara*. It is also of course an authority for the position that the *Dattaka Mimansa* requires the direction of the husband to enable affiliation of the boy given to and accepted by the widow."

I have quoted these observations with especial reference to the circumstance that in this case, which is usually known as the *Rámnad* Adoption Case, the learned Judges of the Madras High Court did not go the whole length of Pandit *Ajudhia Nath's* argument on behalf of the appellant by holding that a widow can adopt a son without the permission of her husband, though the learned Pandit insisted upon its authority as governing this case. The passages which I have quoted clearly show that the learned Judges, whilst laying down the rule as to the dispensability of the husband's permission, had present to their mind the earlier rulings relating to the Benares school which I have already cited, and that they did not intend to lay down the rule as applicable to this part of the country which I may call as the Benares school proper. Moreover, in that case the majority of the husband's *sapindas* had given their consent to the adoption, and this was taken as sufficient substitute for his permission according to the Madras law. This circumstance must be distinctly borne in mind in considering the authority and application of the ruling; all the more so as the ruling has been affirmed by the Lords of the Privy Council on appeal in that very case. The case *(The Collector of Madura* v. *Mootoo Rámalinga Sathupathy)* is reported at page 397 of 12 Moo. I. A., and at page 440 their Lordships of the Privy Council take care to point out that they are not to be understood as overruling the rule laid down by them with

reference to this part of the country. Their Lordships observe (at p. 440) :—

"Against these authorities the appellants have invoked that of the case of *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (1) But what was in fact decided by the very guarded judgment delivered by the late Lord *Wensleydale* in that case ? It was that, according to the native text-writers, including probably *Vasistha*, certainly including the *Dattaka Mimansa* of Nanda Pandita, the authority of the husband was requisite to a valid adoption; that the strictness of the law had been in many districts and, particularly in the Mahratta States, relaxed or modified by local usage; but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular district of Etáwah in Upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held that they could not say that the law in that district did not require the direction of the husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the south of India. Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the *Dravida* country, and particularly in that part of it wherein the *Rámnad zamíndári* is situate, a Hindu widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him."

This quotation is of supreme importance in considering this case, not only because Pandit *Ajudhia Nath* for the appellant has relied upon the *Rámnad* case, but also because this passage clearly shows that the Lords of the Privy Council were even more anxious than the learned Judges of the Madras High Court, whose judgment they affirmed, to point out that the rule which they were laying down as to the dispensability of the husband's permission

(1) 2 Knapp. 203.

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to enable a widow to adopt was not to be held to apply to the whole of India, but was to be limited to the *Dravida* country, namely, the Madras Presidency, and perhaps also the *Maharashtra* country, namely, the Bombay Presidency.

Now, this distinction renders the *Rámnad* Adoption Case inefficacious for supporting the learned Pandit's argument on behalf of the appellant. In the case of *Ganga Sahai* v. *Lakhraj Singh* (1) I fully explained the various divisions and subdivisions of the Hindu law, which must not be lost sight of, more especially in interpreting the Hindu law of adoption. I there pointed out that, although the *Mitakshara* school includes Bombay and Madras along with this part of the country, it is subdivided into four important subdivisions, namely, *Benares, Mithila, Maharashtra* and *Dravida;* and that although these subdivisions unite in respecting the authority of the *Mitakshara,* they do not unfrequently differ in interpreting that authoritative text on points of detail—each subdivision having its own authoritative commentaries on the text.

The same distinction renders inapplicable to this case the more recent ruling of the Lords of the Privy Council in *Sri Vira Virada Prátapa Sri Raghunada Anunga Bhima Deo Kesari Mahárás* v. *Sri Brozo Kishoro Patta Deo* (2) even if the point now under consideration were the exact point in the case. There are, however, certain *dicta* in the judgment of their Lordships which, far from supporting the appellant, tend to weaken the argument so ably addressed to us in support of the appeal. At page 191 of the report their Lordships observe :—

"Positive authority, then, does not do more than establish that, according to the law of Madras, which, in this respect, is something intermediate between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, *if duly authorised by his kindred.*"

These remarks clearly indicate that their Lordships were dealing only with the *Dravida* subdivision of the *Mitakshara* school prevalent in Madras, and the later portions of their judgment clearly show

(1) I. L. R, 9 All. at p. 291. (2) L. R., 3 I. A. 154.

that even under the *Dravida* school, permission of the husband is necessary, though in that particular part of the country it may be substituted by the consent of the *sapindas*. Their Lordships, after ruling that the assent given by one separated and distant *sapinda* (himself the father of the child taken in adoption) was not in law sufficient to authorize the adoption, go on to say :—

"In the present case there is an additional reason against the sufficiency of such an assent. It is admitted on all hands that an authorization of some kinsmen of the husband is required. To authorize an act, implies the exercise of some discretion, whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is that the Mahádevi, representing herself as having the written permission of her husband to adopt, asked the Rája of *Piddakimidy* to give her a son in adoption, and succeeded in getting one. There is nothing to show that the Rája ever supposed that he was giving the authority to adopt which a widow, *not having her husband's permission*, would require. Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decisions in the *Rámnad Case*, had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras."

And then their Lordships proceed to make observations which, I think, may well be borne in mind in deciding this case, though it is governed by the Benares school of law. Their Lordships say :—

"It may be the duty of a court of justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the right

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of parties in actual possession, dependent on the caprice of a woman, subject to all the perincious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property. It seems, therefore, to be the duty of the courts to keep the power strictly within the limits which the law has assigned to it."

Now, it must not be forgotten that these observations were made even with reference to a case governed by the *Dravida* school where, as I have already explained, the consent of the *sapindas* can take the place of permission given by the husband to enable a widow to make a posthumous adoption. I maintain that the principles of these observations apply *á fortiori* to a case such as this, which is governed by the stricter rules of the Benares school of law as to the necessity of the husband's permission.

This view is in accord with the manner in which Westropp, C. J., in the Full Bench case of *Rámji* v. *Ghaman* (1) regarded the matter in a case governed by the *Maharashtra* subdivision of the *Mitakshara* school, which subdivision upon this particular point of the widow's power of adoption may be said to occupy the other extreme opposite to the Benares school. The learned Chief Justice in that case, in delivering the judgment of the Full Bench, assumes all along that that the permission of the husband to validate an adoption by the widow is necessary as the general doctrine of the Hindu law, and in laying down a different rule for the Bombay Presidency, he speaks of it as "*the Mahratta* deviation from ordinary Hindu law," when he holds "that the widow of a Hindu, dying without leaving male issue, may, *if her husband were separated from his family in estate* (or, in other words, when she is his heir), to adopt without any express authority from him (if he have not prohibited her from so doing or otherwise implied his intention that she should not adopt) and without the consent of his relatives."

He then goes on to point out "that there is not any sufficient text or precedent for conceding any wider range to that *deviation*,"

(1) I. L. R., 6 Bom. 498.

and expresses his concurrence in the remarks of Melvill, J., in *Rupchand Hindumal* v. *Rakhmabai* (1), where it was held that even under the *Maharashtra* school the power of a widow to adopt without the permission of her husband or of his kinsmen was limited to separated Hindu family estates, and the learned Chief Justice ruled that a Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided co-parceners. The same is the effect of the *ratio decidendi* adopted by West, J., in the later case of *Giriowa* v. *Bhimaji Raghunath* (2), which also was governed by the *Maharashtra* school.

I have dwelt upon both these cases because they were seriously insisted upon as authorities in support of the appeal; but it is enough to say that they expressly proceed upon the doctrine of the *Maharashtra* school, and that if they are of any value in this case as references, that value lies in showing as they do the untenability, in the Benares school, of the argument for the appellant as to the authority of the husband being presumed or implied as given to the widow for making an adoption because of the spiritual benefits which such adoption might bring to the soul of her deceased husband. And indeed it is only in this sense that the Madras cases, which I have cited and considered at some length, are helpful in this case.

The effect of these cases, expressed briefly, is to show that in the *Dravida* country (that is, Madras), whether the family is joint or divided, the widow cannot make a valid adoption without the permission of her husband, unless she obtains the consent of the majority of her husband's nearest *sapindas;* and that in the *Maharashtra* country (that is, Bombay), where a more lax rule prevails, she may, when in possession of a *divided* estate as heir of her separated husband, make an adoption to him without any kind of express permission, either from him or his *sapindas;* but that in the case of a joint *undivided* Hindu family estate she cannot make

(1) 8 Bom. H. C. Rep., 114. (2) I. L. R., 9 Bom. 58.

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any valid adoption without the consent of her deceased husband's co-parceners in the joint Hindu family.

Now, I have no desire to enter into any elaborate discussion to show how the Benares school upon this point, as represented by the doctrines of the *Dattaka Mimansa* of Nanda Pandit, is more logical and consistent with the general spirit of the Hindu law than either the *Dravida* or the *Maharashtra* subdivision of that system of jurisprudence. But the exigencies of the question to be determined in this case do require me to point out that if the implication of the husband's authority for an adoption by his widow is to be assumed upon the ground of such adoption being beneficial to his soul, I fail to see any reason, either in common sense or in the spirit of the Hindu law, which would enable a dead man's *sapindas* or nearest kinsmen to deprive him from such spiritual benefits by preventing or prohibiting his widow to make an adoption. Further, so far as the Bombay cases are concerned, I fail to see how the fact of a man being joint or separate in estate can affect the powers of his widow to make an adoption for the spiritual benefits of her husband. The devolution of inheritance upon an adopted son is a mere incident flowing from the fact of the adoption, and I am unaware of any authority in the Hindu law which lays down that the possession of property, whether moveable or immoveable, is a condition precedent qualifying the powers of the adoptive parents. Nor am I aware of any authority which would justify the view that the spiritual salvation of a childless Hindu is less important in the case of a member of a joint Hindu family than in the case of a separated member. And if this is so, and if it is also true that the solitary foundation of the Hindu law of adoption is the spiritual benefits to the soul of a childless Hindu, it seems unintelligible and almost irrational why such benefits which, according to the *Dravida* and *Maharashtra* schools, might be created by the widow's adoption, should be made dependent upon the will of the deceased husband's *sapindas*, the very persons most interested, in a mundane sense, in preventing those spiritual benefits, because they would be depriving themselves of inheriting the property of their deceased kinsman, the husband of the widow.

Now, it is not because I have any desire to decide Hindu law cases of this character upon modern methods of reasoning that I have made these observations, which, I confess, assail the doctrines of both the *Dravida* and *Maharashtra* schools of the Hindu law of adoption, and tend to show that those doctrines are inconsistent with the general spirit of that system, both as to spiritual salvation and the right of inheritance which is founded upon that contemplation. I have made those observations because both the *Dravida* and *Maharashtra* schools are subdivisions of the *Mitakshara* school in common with the Benares school which governs this case, and also because the learned Pandit for the appellant insisted upon maintaining that the Madras and Bombay cases must be taken to govern the decision in this case also. I have made these observations also in order to show that the doctrines of the *Dattaka Mimansa* of Nanda Pandit upon this point represent the correct view of the Benares school, and must be preferentially adopted in this case to maintain the harmony of decision as represented by the reported cases governed by the Benares school.

What then has been the course of decision in this part of the country, falling as it does within the area of what I call the Benares school *proper?* I have already shown that so long ago as 1816 the Sadar Diwani Adalat of Calcutta in dealing with a case from these Provinces, *Rája Shumshere Mull* v. *Ráni Dilraj Konwur* (1), held the express permission of the husband to be an essential condition for the validity of an adoption by the widow, and that the rule was approved so long ago as 1834 by the Lords of the Privy Cauncil in *Rája Haimunchul Singh* v. *Koomer Gunsheam Singh* (2). I will now show that there are other cases which lay down the same rule. We all know that Behar is subject to the Benares school, and the Sadar Diwani Adalat of Calcutta in *Jairam Dhani* v. *Musan Dhani* (3) held, consistently with their ruling of 1816, that by the Hindu law applicable to Behar, the permission of the husband is necessary to legalize adoption by his widow, and the same principle was the foundation of the decision of the same Court in *Gournath Chaudhree*

(1) Calc. S. D. A., vol. ii, p. 169. (2) 2 Knapp. 203.
(3) Calc. S D. A., 1830, p. 3.

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v. *Arnopoorna Chaudhrain* (1) which was also a Behar case and governed by the Benares school.

So far as this Court is concerned, the only authoritative *dictum* to be found upon the point is in the judgment of Roberts, J., in *Thakoor Oomrao Singh* v. *Thakoranee Mahtab Koonwer* (2) at p. 103*k* and 103*l* of the report, where he says:—

"It is desirable to consider as regards the facts to be established in the two next issues of the husband's authority to adopt and the fact of what is the law on the subject and what is the view which has prevailed and would seem still to prevail on the subject. The law must be governed by the rules laid down in the *Dattaka Mimansa*, which is of paramount authority in the tracts governed by Benares law. In the present case the plaintiff must prove that the widow had the authority of her husband to adopt, that she made the adoption when the boy adopted was under six years of age and with the prescribed ceremonies. If the plaintiff does not succeed in establishing these points, the filial relation fails: he may be entitled to some compensation, but he has no right to inherit the property."

This view, so far as it insists upon the necessity of the husband's permission, which was expressed in 1868, has never yet been doubted by any Judge of this Court, and in my opinion furnishes evidence of how the law has been uniformly understood in this part of the country, and I feel that I am in no small measure supported in this observation by the circumstance that in all the cases relating to the Benares school which I have already cited, the party interested to maintain the adoption pleaded that, as a matter of fact, the deceased husband had given permission to the widow, as indeed is the case in this very case also, although the lower Courts have held that no such permission is proved. Another notable instance of the same circumstance is the case of *Chowdry Pudum Singh* v. *Koer Oodey Singh* (3) which was a case which went up to the Privy

(1) Calc. S. D. A., vol. viii, part I, p. 332.

(2) N.-W. P. H. C. Rep., 1868, p. 103*a*.

(3) 12 Moo. I. A. 350.

Council from this part of the country, and their Lordships, referring to the pleadings of the parties in that case, go on to say :—

"The question as to the adoption of the appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a widow under an authority conferred upon her for that purpose by her husband. Of course, such authority *must be strictly pursued*, and as the adoption is for the husband's benefit, so the child must be adopted to him, and not to the widow alone. Nor would an adoption by the widow alone, for any purpose required by the Hindu law, give to the adopted child, even after her death, any right to the property inherited by her from her husband. In order, therefore, to establish the validity of the adoption in this case, it was necessary for the appellant to prove—*first*, the authority given by *Hem Singh* to his wife to make the adoption; and *second*, the actual adoption by *Khoosal Koer* of the appellant as the son of *Hem Singh*."

Now, I have cited this passage not because it specially decides the exact point now before us, but because it fully bears out the argument of the learned Pandit *Bishambhar Nath*, to the effect that ever since 1816 it has always been taken for granted and assumed as an unquestionable doctrine that express permission to the widow by her deceased husband is an essential condition precedent to the validity of an adoption by her in cases governed by the Benares school. And whilst this is so, the learned Pandit *Ajudhia Nath* for the appellant, beyond relying upon his interpretation of the original texts and relying upon the *Dravida* and *Maharashtra* cases arising in Madras and Bombay, has been unable, notwithstanding much research, to point out a single case reported or unreported in which the parties did not raise the plea as to the necessity of the husband's permission, or in which this Court, or any other, dealing with the question in cases governed by the Benares school has ever dispensed with such permission as an essential element for the validity of an adoption by the widow. Referring to my own personal experience both at the Bar and on the Bench, I think I may safely affirm that till so late as 1886, when my brother

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Straight and I had to decide the case of *Ganga Sáhai* v. *Lekhraj Singh* (1) it was never seriously contended that, under the Benares school of law and the actual living practice in this part of the country, the husband's permission was not essential to the validity of an adoption by the widow.

Speaking for myself, I cannot refrain from saying that in deciding this case I have received valuable help from the learned and able arguments addressed to us in the Full Bench by the learned Pandits who appeared for the parties; and indeed it has been in view of this circumstance that I have considered it my duty to cover the whole ground of those arguments by delivering the judgment at such length upon a vexed question, such as this case has raised. And I trust that in dealing with that question I have not transgressed the advice given by the Lords of the Privy Council in *The Collector of Madura* v. *Moottoo Rámalinga Sathupathy* (2) nor their Lordships' observations in *Sri Raghunadha* v. *Sri Brozo Kishoro* (3) as to the manner in which Courts of justice in this country must deal with vexed questions of the Hindu law where the original Hindu texts and interpretations are divergent, and the case-law is also in conflict. I have already quoted the two passages to which I have just referred, and I think, under the circumstances of this case and the practice prevailing in this part of the country, it is especially important to bear in mind the advice given by their Lordships in the later of those passages, where they say that "it is impossible not to see that there are *grave social objections* to making the succession of property dependent on the *caprice of a woman*, subject to all the *pernicious influences* which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property."

These observations are particularly applicable to this case, because as I have set forth at the outset of this judgment, the admitted circumstance that Musammat Lareti, defendant, in making the adoption of Tulsi, defendant, and executing a deed in his favour on the 16th of January, 1886, on that same day obtained from

(1) I. L. R. 9 All. 253. (2) 12 Moo. I. A., at p. 436.
(3) L. R. 3 I. A. at p. 193.

Jhamman, the grandfather and guardian of the adopted son, an *ikrarnama*, agreeing to pay Rs. 100 annually from this estate to one Rám Sahai, who is the son of the widow's brother, and in no sense entitled to inherit any interest in her husband's estate. The circumstance to my mind is a strong illustration of the circumstances contemplated by the Lords of the Privy Council in the passage which I have just cited as to the *caprice of a woman*, and the *pernicious influences* to which she, especially in widowhood, is subject in India.

But it is not upon the ground of any finding as to the capriciousness of the transaction of the 16th of January 1886, or of collusion or fraud between the widow Musammat Lareti and Jhamman, the grandfather of the adopted son Tulsi, nor upon any suspicion of any undue influence exerted in behalf of Rám Sahai, the son of the widow's brother, that I decide this case. I decide it upon the doctrines of the Hindu law of adoption as they must be understood in the Benares school; as they have been uniformly understood ever since 1816 in the reported cases; as they have been uniformly acquiesced in and adopted in practice by the Hindu population inhabiting the territories governed by the Benares school: and I think that we should be doing nothing more or less than introducing not only a social but a religious innovation and disturbing the accepted rules of succession to property by adopted sons if we were to abrogate the uniform course of decision in this part of the country, dating so far back as 1816. If there is any validity in the judicial doctrine of *stare decisis*, which I think has validity and is applicable even to such cases, I hold that we should be shaking settled titles and undoing the uniform judicial exposition of more than half a century of the British Rule in India, if we were in 1890 to adopt the argument of the learned Pandit *Ajudhia Nath* for the appellant that ever since 1816 the Courts of British India have misunderstood the doctrines of the Benares school of Hindu law as to adoption, and have wrongly insisted upon the necessity of express permission by the husband as an essential condition precedent to the validity of an adoption by his widow.

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I am wholly unable to accept any such result, and hold that, according to the Benares school of Hindu law, no adoption can be legally made by a widow without the express permission of her husband; that where she makes an adoption without such permission, the doctrine of *factum valet* as understood in the Hindu law or in other systems of jurisprudence cannot cover the case, because it affects the very essence of the competency to *take* a child in adoption; that therefore such adoptions, though actually made, are wholly illegal and invalid, null and void, under the Benares school of Hindu law prevalent in the territories within the jurisdiction of this Court.

Since, in pursuance of my brother Straight's order of 6th June, 1888, the whole of this case has been referred to the Full Bench, the result of my judgment in the case is to dismiss this appeal with costs, and I would do so accordingly.

EDGE, C.J.—I have carefully considered the very exhaustive and instructive judgment which my brother Mahmood has just delivered, and with it I thoroughly agree. I feel that I can add nothing to it, but I wish to say that, having regard to the fact that the texts of the early commentators are more or less in conflict, to the fact that no single case which arose in the North-Western Provinces, in Oudh, or in those districts in Lower Bengal in which the Benares school is followed, has been cited to us in support of the contention that a Hindu widow subject to the Benares school can, without an express authority given to her by her deceased husband, make a valid adoption to him, and to the decision in the case from Gorakhpur of *Rája Shumshere Mull* v. *Rání Dilraj Konwur* (1), to that in the case from Etáwah of *Rája Haimunchul Singh* v. *Koomer Gunsheam Singh* (2) in 1834, to that in the case from Agra of *Thakoor Oomrao Singh* v. *Thakoranee Mahtab Koonwer* (3) in 1868, and to that in the case from Aligarh of *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (4), I would expect that any one who would now contend that a Hindu widow subject to the Benares school could make a valid adoption to her deceased

(1) Calc S D. A., vol. ii, p. 169.
(2) 2 Knapp, 203.
(3) N.-W P. H. C. Rep., 1898, p. 103*a*.
(4) 12 Moo. I. A., 350.

husband without express authority given by him, would support that contention by clear proof of general usage in the particular district that an adoption under such circumstances was, in the particular district, recognised as valid by those subject to the Benares school. No such evidence has been given here, and no such usage has been proved. I may further say that I entirely agree with my brother Mahmood that the principle of *factum valet* is inapplicable to a case like this.

In the view which I take of the case, it is not necessary to consider whether or not an only son or a sole surviving son can, according to the Hindu law, as interpreted by the Benares school, be given or taken in adoption.

I agree that this appeal should be dismissed with costs.

STRAIGHT, J.—I have very carefully read and considered the judgment of my brother Mahmood, and I concur in it, and in his order dismissing the appeal with costs.

BRODHURST, J.—I entirely agree.

TYRRELL, J.—I agree.

Appeal dismissed.

PRIVY COUNCIL.

J. C.
P. C.
1890
March 11.

BHAGWAN SAHAI (DEFENDANT) *v.* BHAGWAN DIN AND OTHERS (PLAINTIFFS.)

[On appeal from the High Court for the North-Western Provinces.]

Sale, with right reserved of repurchase within a period, distinguished from mortgage—Construction of documents of sale and of agreement for re-sale.

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage. *Alderson* v. *White* (1) referred to and followed, the law of India and of England being the same on this point.

Appeal from a decree (16th November 1886) of the High Court (2) affirming a decree (20th August 1885) of the Subordinate Judge of Cawnpore.

Present: LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

(1) 2 De. Gex. and J., 105. (2) I. L. R., 9 All. 97.

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The question here was whether the parties were in the relation of mortgagor and mortgagee, so that a right to redeem could subsist.

The suit was brought by the respondents to redeem a mauza, Harbaspur, alleged to have been transferred in 1835 by way of conditional sale, by the plaintiffs' predecessors in title, to the predecessor of the defendant who was now appellant.

The plaint stated transfers both in, and subsequently to, 1835, alleging that the purchase-money had been repaid as the result of the defendant, and those through whom he claimed, having realized the profits of Harbaspur. A declaration of the plaintiffs' right to redeem, mesne profits, and an account, were demanded. The written statement, contained among other defences, that the transaction of 1835 was an absolute sale from the first, and not a mortgage.

The Subordinate Judge decided that the property was redeemable by the plaintiffs, and decreed the claim, subject to the condition that the plaintiffs should repay the purchase-money, *viz.*, Rs. 4,000. This was paid into Court on 29th August 1885, and a decree was thereupon made for redemption.

An appeal from this decree was dismissed by the High Court. In the judgment are the words—"the plaintiffs contended that the sale was a conditional sale, or mortgage by conditional sale. The correctness of this was admitted on behalf of the defendant." The judgment is reported in I. L. R., 9 All. 98.

Mr. *J. D. Mayne*, for the appellant, argued that the transaction of 1835 was an absolute sale, with the reservation of a right of repurchase by the vendor, which had not been exercised within the time limited by the agreement in that behalf; a right which had, therefore, ceased to have effect. There was, therefore, not existing here any conditional sale or mortgage, within the Regulation XVII of 1806, which could support a right to redeem. It was a question of whether the relation of mortgagee and mortgagor subsisted between the parties, not merely a question of limitation. It was

submitted that the English case (to which LORD MACNAGHTEN referred), *Alderson* v. *White* (1), was conclusive as to the law, identical on this point in both countries.

Mr. *C. W. Arathoon*, for the respondent, argued that there had been a mortgage by conditional sale, as in *Radhanath Dass* v. *Gisborne & Co.* (2). This case, however, their Lordships distinguished. He also referred to Macpherson on the Law of Mortgage (ed. 1868) p. 10, and to Bengal Regulation XVII of 1806.

Mr. . *J. D. Mayne* was not called upon to reply.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

SIR BARNES PEACOCK.—This case depends upon the construction of two documents dated February 20th, 1835. By the first document Alum Singh and others, who professed to be the proprietors of the property therein mentioned, declared that they had of their own accord absolutely sold the entire property to Ganga Din "in lieu of Rs. 4,000 of the current coin." That was an absolute sale by Alum Singh to Ganga Din. Then on the same day another document was executed, by which Ganga Din, reciting the deed, says that he has purchased the property for the Rs. 4,000, and adds:—"However, I have as a matter of favour, mercy, kindness, and indulgence, executed this deed, and do hereby stipulate that if all these vendors will within a period of ten years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same, and cancel this valid sale. During the aforesaid term I shall remain in possession, collect the rent, enjoy the profits, and be liable for loss; the vendors shall have no concern whatever. I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term. In case the whole of the principal is not paid"—and their Lordships think that the construction of that is—"In case the whole of the principal is not paid according to the terms of this document,"—"the vendors shall not be able to cancel the sale by payment of the principal."

(1) 2 De. Gex. and J., 105. (2) 14 Moo. I. A. 1.

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Those documents having been executed in 1835, in the year 1884—nearly 50 years afterwards—a suit is commenced by the plaintiffs, representing the vendors, claiming to redeem the property upon payment of the Rs. 4,000. The defendant in his written statement says :—"An absolute sale-deed was executed in respect of the property in suit in favour of Ganga Din, whose proprietary interests were then afterwards purchased at auction by Sukh Din Bajpai." Then he says—"Under the deed of agreement alleged by the plaintiffs they have no right of redemption by law," and in the last two lines of paragraph 9 he says—"The two parties neither stood, nor do now anyhow stand, in the relation of mortgagor and mortgagee."

The first Court having held that the parties did stand in the relation of mortgagor and mortgagee, and having decreed that the plaintiffs were entitled to redeem, an appeal was preferred to the High Court, and the third ground of appeal is thus stated :—"Because under the terms of the agreement the plaintiffs cannot now sue to redeem the property in suit." The High Court upon the hearing of the appeal affirmed the decision of the lower Court, and held that the parties stood in the relation to each other of mortgagor and mortgagee, and not in the relation of one being an absolute vendee with a right given to the vendors to repurchase within a period of ten years upon repayment of the full amount of the purchase-money. It does seem contrary to all principles of equity and good conscience that when it was stipulated that the money should be repaid within the period of term years from 1835, the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of 60 years. That this was not a mortgage, at any rate according to English law, seems clear from the decision of Lord Chancellor Cranworth in the case of *Alderson* v. *White* (1). In giving judgment the Lord Chancellor says this—"These deeds taken together do not on the face of them constitute a mortgage; and the only question is whether, assuming the transaction to be a

(1) 2 De Gex and J. 105.

legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense; that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." In this case the vendors did not stipulate that they should have a right to repurchase, but the vendee, as a matter of grace and kindness, stipulated that they should have that right. The Lord Chancellor proceeded—" In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment not of what should be due but of the full amount of the purchase-money of 4,739*l*"—exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs. 4,000— "Was that, if taken according to its terms, a lawful contract? Clearly so. What, then, is there to show that it was intended to be a mere mortgage? I think that the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be; and I see but little evidence to that effect here." That passage was approved of in a case in the House of Lords, reported in the 13 Law Reports, Appeal cases, page 568—*The Manchester, Sheffield and Lincolnshire Railway Company* v. *The North Central Waggon Company*. It is clear that this case was not one of mortgagor and mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years.

Under these circumstances their Lordships think that the decision of the High Court ought to be reversed, and that their Lordships ought to give the judgment which the High Court ought to have given, namely to reverse the decision of the first Court and to dismiss the suit with costs in both Courts.

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Their Lordships will humbly advise Her Majesty to that effect. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

Solicitors for the respondents: Messrs. *T. L. Wilson* and *Co.*

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

RADHA CHARAN AND OTHERS (JUDGMENT-DEBTORS) *v.* MAN SINGH (DECREE-HOLDER.)

Execution of decree—Application for execution withdrawn by decree-holder—Rule in Sarju Prasád v. *Sita Rám—Civil Procedure Code, ss.* 373, 647—"*Suit*"—"*Appeal.*"

S. 647 of the Civil Procedure Code makes s. 373 applicable to proceedings in execution of decree. The words "suit" and "appeal" in s. 647 apply to suits and appeals in the strict sense of those terms, and were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal.

An application for execution of decree by arrest of the judgment-debtor was ordered by the Court to be struck off, upon the statement of the decree-holder's pleader that the judgment-debtor was in hiding, and that the decree-holder did not desire to prosecute the application further. At that time an order for a warrant of arrest had been issued subject to the payment of fees, but those fees had not been paid nor had the diet money been deposited, and no steps were taken to proceed with the application. No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held by the Full Bench that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code.

Sarju Prasád v. *Sita Rám* (1), and *Fakir-ullah* v. *Thakur Prasád* (2), approved and followed. *Bijai Singh* v. *Haiyat Begum* (3) distinguished.

THE appellants in this case were judgment-debtors, and the respondent was the decree-holder, of a decree passed on the 2nd March 1881, for recovery of money by enforcement of lien against certain immoveable property.

(1) I. L. R. 10 All. 71. (2) *Ante*, p. 179.
(3) Weekly Notes, 1889, p. 163.

The first application for execution of the decree was made on the 20th February 1884, but the application was struck off by order of the Court dated the 8th March 1884.

The next application for execution was made on the 1st February 1886, and notice was thereupon issued to the judgment-debtors to show cause why the application should not be granted, and the case came on for hearing on the 23rd February 1886, when the prayer in the application for execution as to the arrest of the judgment-debtors, was considered.

On the 23rd February 1886, the date fixed for the disposal of the application, the decree-holder's pleader, who had not deposited the necessary *talbana* fees, instead of desiring to prosecute the application, made a statement to the Court to the effect that the judgment-debtors were hiding, and requesting the Court to strike off the application for execution, because it was not desired to proceed with it any further. The Court in accordance with this request struck off the application. No permission was applied for and given to the decree-holder to make a fresh application for execution of the decree.

On the 27th June 1888, a fresh application for execution was made by the decree-holder. Notice having been issued to the judgment-debtors, they filed objections, which were allowed, and the application dismissed by an order passed on the 8th December 1888. The order was in the following terms :—

" Execution was applied for on the 20th February 1884, and the case was struck off on the 8th March 1884. Then on the 1st February 1886, the decree-holder stated that " the judgment-debtor having concealed himself, the case cannot be prosecuted at present," the case was struck off. That application cannot save time, according to the ruling in *Sarju Prasád* v. *Sita Rám* (1) and as there are no words in the statement of the decree-holder from which an implied or express permission of the Court to file a fresh application might be inferred, the decree cannot be executed. Irrespective of the question of permission, the present application is barred by

(1) I. L. R., 10 All. 71.

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limitation also, because it has been presented more than three years after the application of 1884. It is therefore ordered that the case be dismissed, and the costs charged to the decree-holder."

The decree-holder appealed to the District Judge of Agra, who gave judgment as follows :—

"In this case the fees were lodged for notice to issue to respondent. It is urged by the respondent that this does not amount to a step in aid of execution. The mode of execution was specified to be by arrest. When the fees for arrest should have been filed, the appellant stated that the judgment-debtor was at the time in hiding and not to be found, and prayed that the case might be struck off. The whole point is whether that impliedly asks for permission to renew the application when the debtor may be discovered. On the analogy of many cases that I have decided on this and closely similar points, I hold that these words amount to an implied request for permission to renew the execution, and decree the appeal with costs against the respondents."

The judgment-debtors appealed to the High Court. The appeal was referred to the Full Bench.

Babu *Durga Charan Banerji*, for the appellants.

Pandit *Sundar Lál*, for the respondent.

EDGE, C. J.—This was an appeal from an order in execution of a decree. The question turns on what is the effect in law of what took place on the 23rd February 1886. Now, on the 1st February 1886, the second application for execution of the decree was presented, and notice was issued and served for the hearing of that application on the 23rd February 1886. On the 23rd February 1886, the pleader for the decree-holder appeared, and stated that the judgment-debtor was in hiding, and that the decree-holder did not want to prosecute the application further. The application was one, I should have said, for execution against the person of the judgment-debtor by his arrest, and an order for a warrant had been issued, subject to the payment of fees. Those fees had not been paid, nor had the diet money been deposited. In fact, beyond

making his application on the 1st February and appearing by his pleader on the 23rd February, the decree-holder took no steps to proceed with his application. The Munsif struck off the application. On the 27th June 1888 the decree-holder presented his third application for execution. The question for us to consider is whether this is a case in which we can apply the procedure of s. 373 of the Code of Civil Procedure. Now, looking at these facts, in my opinion, the Munsif was justified in treating the case as one in which the decree-holder withdrew from his application or abandoned it. No permission to bring a fresh application was given. The application was, as I have said, struck off. This is a question which has been frequently considered by various members of the Court. It has been argued here to-day that s. 373 does not apply to proceedings in execution. Unless we are to apply, so far as may be, the principles provided for the guidance of Courts in the other sections of the Code of Civil Procedure, there would in a great number of cases, be no provision for what should be done in execution proceedings, as the sections which exclusively relate to execution proceedings are deficient and far from exhaustive, if we are to regard them as the only sections which supply the procedure in execution cases. In my opinion, s. 647 makes s. 373 applicable. I think that "suit" and "appeal" in that section apply to those proceedings generally known as a suit and an appeal, that is, to suits and appeals in the strict acceptation of the terms, and that in s. 647 the words "suit" and "appeal" were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal. The leading case in this Court on the question before us is that of *Sarju Prasád* v. *Sita Rám* (1), and I think the latest case on the subject in this Court is that of *Fakirullah* v. *Thakur Prasád* (2). In my opinion the case of *Sarju Prasád* v. *Sita Rám* (1) is correctly interpreted in the last-mentioned case, and with the view of the bearing of *Sarju Prasád's* case there expressed I agree. We have been referred to a case, *Bijai Singh* v. *Haiyat Begam* (3), in which my brother Tyrrell and I said that "an application for execution struck off

(1) I. L. R., 10 All. 71. (2) *Ante*, p. 179.
(3) Weekly Notes, 1889, p. 163.

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merely because *talbana* has not been paid or some step is not taken does not bar a further application." To avoid misapprehension I have my brother Tyrrell's authority for saying that when we made that statement we were not contemplating a case in which time had been granted for payment of *talbana*, or to perform any other act which was necessary. If it had been a case where time had been granted and the Judge had proceeded under s. 158 of the Code of Civil Procedure, we would not have expressed the opinion which we are there reported to have expressed. My opinion is that this appeal should be decreed with costs and the order of the first Court restored.

STRAIGHT, J.—I am of the same opinion, and as I have already in *Fakirullah* v. *Thakur Prasád* (1) very fully expressed my views on this point, which, it is satisfactory to me to find, have the approval of the learned Chief Justice and my brother Judges, I do not think it necessary to repeat them. I agree in decreeing the appeal, reversing the order of the Judge and restoring that of the Munsif.

BRODHURST, J.—I concur.

TYRRELL, J.—I concur with the judgment of the learned Chief Justice.

MAHMOOD, J.—I also concur, because I still adhere to the rule laid down by my brother Straight with my concurrence in the case of *Sarju Prasád* v. *Sita Rám* (2) which is the first of a series of rulings of this Court. How that ruling has been interpreted and applied was the subject of consideration by me in *Fakirullah* v. *Thakur Prasád* (1) and in delivering my judgment in that case I went *seriatim* into all the cases which had since been reported upon this point in this Court. There is a ruling, however, of a somewhat recent date of West and Birdwood JJ. in *Shankar Bisto Nadgir* v. *Narsinghrao Rámchandra* (3) which was not before my brother Straight and myself when we decided the case of *Sarju Prasád* v. *Sita Rám* (2). I think, since this case has been cited, I may respectfully say that I am not prepared to accept that ruling, but I do not think I need say much about it, because Mr. Justice West

(1) *Ante*, p. 179. (2) I. L. R., 10 All. 71.
(3) I. L. R., 11 Bom., 467.

himself in his judgment points out the distinction which he drew between that case and the other two cases which turned on the construction of s. 373 of the Codeof Civil Procedure and its application to execution cases. I agrecalso in the decree which has been made.

Appeal allowed.

APPELLATE CIVIL.

1890 *May* 30.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

RAHIM BAKHSH AND ANOTHER (DECREE-HOLDERS) v. DHURI AND ANOTHER (OPPOSITE PARTIES).*

Execution of decree—Sale of immoveable property set aside—Order refusing refund of price to purchaser—No appeal from such order—Civil Procedure Code, s. 315.

No appeal lies from an order refusing a refund of price to a purchaser the sale to whom has been set aside under s. 315 of the Civil Procedure Code. *Soudagar Mal* v. *Abdul Rahman Khán* (1), *Tapesri Lál* v. *Deoki Nandan Rai* (2), and *Rám Dial* v. *Rám Das* (3), referred to. *Baijnath Sahai* v. *Moheep Narain Singh* (4) dissented from.

IN execution of a simple money decree, the decree-holders caused certain immoveable property to be sold as the property of the judgment-debtors. Certain third persons then intervened, and established by suit that they, and not the judgment-debtors, were owners of the property, and that the judgment-debtors possessed no saleable interest therein. The purchasers at the sale thereupon applied under s. 315 of the Civil Procedure Code for a refund of the purchase-money which had been paid to the decree-holder.

The Court of first instance (Munsif of Aligarh) rejected the application on the ground that the sale had not been actually set aside.

On appeal to the District Judge of Aligarh, an objection was taken on behalf of the decree-holders respondents that the order of

* First appeal, No. 2 of 1890, from an order of A. M. Markham, Esq., District Judge of Aligarh, dated the 6th December 1889.

(1) Weekly Notes, 1890, p 85.
(2) Weekly Notes, 1890, p. 89.
(3) I. L. R., 1 All. 181.
(4) I. L. R., 16 Calc. 535.

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the lower Court was not appealable. The Judge overruled this objection, observing :—

"I hold that the order is appealable. Under the last clause of s. 315, the repayment of the purchase-money, when allowed by the Court under the opening clauses of the section, can be enforced "under the rules provided by the Code for the execution of a decree for money." An exactly similar provision is appended to s. 293, and orders under that section have been held by the Calcutta High Court— *Baijnath Sahai* v. *Moheep Narain Singh* (1)—to be appealable, as being of the nature of questions arising under s. 244. It is argued, however, that there is this difference, that under s. 293, only executive action is provided for, whereas under s. 315 there has to be an antecedent finding come to as to the non-existence of the judgment-debtor's interest in the property sold. But it is not contemplated by s. 315 that that finding should be *under that section*, nor indeed could a finding on any such point be come to under s. 315. Moreover, if it be conceded, as it must be in view of the recent ruling referred to above, that an order under the last clause of s. 315, as to the enforcement of the refund of purchase-money, can be appealed, *a fortiori* an order refusing to order the refund can be appealed. The argument from convenience would also support this; and even if the Calcutta ruling did not exist to guide me, I should, on the principle that *boni judicis est ampliare jurisdictionem*, hold that the order of the learned Munsif under s. 315 is appealable." The learned Judge proceeded to deal with the case on the merits, set aside the Munsif's order, and remanded the case under s. 562 of the Civil Procedure Code.

The decree-holders appealed to the High Court on the ground that "the order of the Munsif under s. 315 of the Civil Procedure Code, refusing to order refund, was not appealable, and therefore the lower Court's order of remand on appeal is illegal."

Babu *Durga Charan Banerji*, for the appellants.

Babu *Bishan Chandra Moitro*, for the respondents.

(1) I. L. R., 16 Calc. 535.

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EDGE, C. J., and BRODHURST, J.—The Munsif made an order refusing to order a refund under s. 315 of the Civil Procedure Code. The purchaser, the sale to whom had been set aside in a suit, and who had applied for a refund of the purchase-money, appealed to the District Judge. The question before us now is whether an appeal lay from the order under s. 315. It appears to us that no appeal lay. The principles which we applied in deciding the case of *Soudagar Mal* v. *Abdul Rahman Khán* (1) and which were applied by our brother Tyrrell in *Tapesri Lál* v. *Deoki Nandan Rai* (2) apply equally to this case. We have been referred to *Baijnath Sahai* v. *Moheep Narain Singh* (3) and to the Full Bench judgment of this Court in *Rám Dial* v. *Ram Dás* (4). Our decision and that of our brother Tyrrell are certainly in conflict with the case of *Baijnath Sahai* v. *Moheep Narain Singh* (3). For the reasons stated by us in *Soudagar Mal* v. *Abdul Rahman Khán* (1), we think that the decision was right. We adhere to it. As to the Full Bench case in *Rám Dial* v. *Rám Das* (4), we may say that we do not agree with the principles upon which that case was decided. One of the Judges there dissented, another of those Judges, Mr. Justice Turner, with one of us, had held to the contrary in *Mussammat Hurdei Beebee* v. *Babu Surjoo Pershad* (5). We are of opinion that an appeal did not lie to the Court below. We allow the appeal and set aside the order below.

Appeal allowed.

FULL BENCH.

1889
November 21.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

SUJAN SINGH (DECREE-HOLDER) *v.* HIRA SINGH AND OTHERS (JUDGMENT-DEBTORS).

Execution of decree—Limitation—Act XV of 1877 *(Limitation Act), sch. ii,* No. 179 (4)—*"Step in aid of execution"—Application by decree-holder under Civil Procedure Code, s.* 258.

The expression "step in aid of execution" in Act XV of 1877 (Limitation Act) sch. ii, No. 179 (4) was intended to cover any application made according to law in

(1) Weekly Notes, 1890, p. 85.
(2) Weekly Notes, 1890, p. 89.
(3) I. L. R., 16 Calc. 535.
(4) I. L. R., 1 All. 181.
(5) N.-W. P. H. C. Rep., 1874, p. 309.

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furtherance of the execution proceedings under a decree. It includes applications made by a decree-holder under s. 258 of the Civil Procedure Code to enter up part satisfaction of the decree.

Per Mahmood, J.—Provided that the payment asserted in the application was actually made.

THIS was an application for execution of a decree for enforcement of hypothecation, which was passed on the 17th August 1878. The application was made on the 20th November 1884, and the question was whether or not it was barred by limitation.

The first application for execution was made on the 29th June 1879. On the 20th June, 1882, the decree being then alive, an application purporting to have been made on behalf of the judgment-debtors was presented to the Court executing the decree by the pleader for the decree-holder, and upon this application it was endorsed that Rs. 800 had been realized, and that certain conditions had been agreed upon with reference to the balance due under the decree being paid in six months. In the course of the proceedings under the application of the 20th November 1884, one of the judgment-debtors presented an application dated the 5th May 1885, in which he stated that he had paid Rs. 800 on the 20th June 1882, by means of an application which was made through the pleader for the decree-holder, and that certain other sums had been paid by this judgment-debtor himself in June and September 1883.

The present application was opposed by the judgment-debtors on the ground that it was barred by limitation.

The Court of first instance (Subordinate Judge of Aligarh) held that the application was made within time, with reference to the provisions of ss. 19 and 20 of the Limitation Act (XV of 1877).

On appeal by the judgment-debtors, the lower appellate Court (District Judge of Aligarh) found that Rs. 800 had been paid in part satisfaction of the decree on the 20th June 1882; that the application of that date was neither written nor signed by the judgment-debtors, but was put in by the pleader for the decree-holder; that ss. 19 and 20 of the Limitation Act were not applicable to the case; and that the application of the 20th November 1884 was barred

by limitation. The Court accordingly reversed the order of the Court of first instance.

The decree-holder appealed to the High Court. The appeal came on for hearing before Brodhurst and Mahmood, JJ., who recommended that it should be referred to the Full Bench, and it was referred accordingly.

Mr. *Hamidullah*, for the appellant.

Mr. *Abdul Majid* and Babu *Jogindro Nath Chaudhri*, for the respondents.

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STRAIGHT, J.—Upon the statement of the facts in the order of reference, as well as from the learned Judge's findings as the Court of first appeal, I have no doubt that the petition filed in Court on the 20th June 1882 by Lala Juala Pershád, the pleader for the decree-holder, under a power-of-attorney, must be regarded as presented on the decree-holder's behalf, and that in this way he asked the Court executing his decree to enter up part satisfaction of it, as required by s. 258 of the Code. At the time this petition was filed, there was an execution-proceeding pending in the Court at the instance of the decree-holder, and, had he not authorized his pleader to put in this petition, he would have laid himself open to a proceeding by the judgment-debtor of the kind mentioned in paragraph 2 of s. 258 of the Civil Procedure Code, while the payment of Rs. 800, which in a petition of the 5th May 1885, the judgment-debtor admits he made, could not have been recognized by any Court executing the decree, unless so certified by the decree-holder. I think the petition of the 20th June 1882, therefore, was an application by the decree-holder in that execution-proceeding, and the only remaining point for consideration is, was it an application to take some "step in aid of execution" within the meaning of clause 4, column 3, art. 179 of the Limitation Act? In *Sitla Din* v. *Sheo Prasad* (1), I held with the approval of my brother Tyrrell that a joint application by a decree-holder and judgment-debtor asking sanction of the Court to the postponement of a sale

(1) I. L. R., 4 All., 60.

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that had been advertised was an application to take a step in aid of execution. In *Kishori Lál* v. *Sham Karan* (1) my brothers Tyrrell and Mahmood held that an application by a decree-holder to take money out of Court, paid in by a judgment-debtor, was an application to take a step in aid of execution. I expressed a similar view in *Paran Singh* v. *Jawahir Singh* (2), which was concurred in by Duthoit, J., and a like opinion was stated by the Madras High Court in *Dharanamna* v. *Subba* (3). In *Bandopadhya* v. *Mukhapadhya* (4), Cunningham and Ghose, JJ., held that an application by a decree-holder under s. 258 was a step in aid of execution, and the same view was adopted by my brothers Tyrrell and Mahmood in *Muhammad Husain Khán* v. *Ram Sarup* (5). Mr. *Jógindro Nath* for the judgment-debtors, respondents, very frankly admitted that the rulings of the Court on the point were uniform and consistent, and, if my recollection serves me right, besides those reported, which I have noted above, there are many others to the same effect that have not been reported. These reported cases extend over a period from 1880 to 1886, and have, no doubt, been acted upon by the subordinate Courts and parties to execution proceedings therein; and though it is true that the cases to be found in I. L. R., 8 Calc., 89 and 10 Calc., 549, are the other way, I think that, if upon no other ground than that of avoiding disturbance of rights acquired upon the strength of them and other obvious inconveniences likely to follow from a contrary view, we should elect *stare decisis*. But apart from this, I am of opinion that such an application as that before us here is one to take a "step in aid of execution." I agree with what was said by Cunningham and Ghose, J.J., in the case reported in I. L. R., 12 Calc. 608 as to why it should be so regarded, and it is unnecessary for me to repeat what they said on the subject. Reading cl. 4, art. 179, sch. ii of the Limitation Act, it is clear that the Legislature, by mentioning first an application for execution and then an application to take some step in aid of execution, meant by these latter words to include something other than a mere application for execution pure and simple,

(1) Weekly Notes, 1882, p. 184.
(2) I. L. R., 6 All. 366.
(3) I. L. R., 7 Mad., 306.
(4) I. L. R., 12 Calc., 608.
(5) I. L. R., 9 All., 9.

and in using the terms "in aid of execution" I think it was intended to cover any application made according to law, in furtherance of the execution proceedings under a decree. That such an application as was presented by the decree-holder's pleader in the case before us was one in this sense within this limitation article, I have no doubt. It therefore becomes unnecessary to consider or determine the point mentioned in the referring order with regard to the Full Bench ruling of this Court in *Ramhit Rai* v. *Satgur Rai* (1), though I may add that, had it become necessary to do so, I should have declined to reconsider or depart from it, seeing that it was given in 1880 and has been since then frequently followed, notably in *Janki Prasad* v. *Ghulam Ali* (2) by my brothers Tyrrell and Mahmood. Applying the view I have expressed to this second appeal from order, I am of opinion that the decree-holder, applicant's, application for execution of the 20th November 1884, was not barred by limitation, and, the appeal being allowed, the order of the Judge is reversed, and the order of the Subordinate Judge should be restored, the decree-holder to get his costs in these proceedings.

EDGE, C. J.—I can add nothing to my brother Straight's judgment, with which I thoroughly agree.

BRODHURST, J.—I concur.

TYRRELL, J.—I agree.

MAHMOOD, J.—The facts of this case are fully stated in the order of reference passed by my brother Brodhurst and myself on the 17th February, 1888, and I need not repeat them here. The points of law to which they give rise, in the manner in which those points have been argued before the Full Bench, seem to me to be the following:—

(1) Whether the application of 20th June 1882 was an application "*in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree*" within the meaning of cl. 4, art. 179, sch. ii of the Limitation Act (XV of 1877).

(1) I. L. R., 3 All., 247. (2) I. L. R., 5 All., 201.

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(2) Whether the payment of Rs. 800 to which the application of 20th June 1882 related, can be regarded as payment of "*interest on debt*" within the meaning of s. 20 of the Limitation Act (XV of 1877) so as to entitle the decree-holder "*to a new period of limitation*" to be "*computed from the date when the payment was made.*"

In considering the first of these questions it is important to bear in mind that the application of 20th June 1882, was framed and worded so as to purport to have been made not on behalf of the decree-holder but on behalf of the judgment-debtors, respondents; that according to the lower appellate Court's finding the application was neither written by the judgment-debtors nor signed by them, but that it was presented by the decree-holder's pleader with an endorsement thereon as to the receipt of Rs. 800 in part payment of the decree; and that such certification was accepted by the Judge executing the decree. Upon these findings the learned Judge of the lower appellate Court has held that the application was wholly valueless for purposes of furnishing a fresh starting point of limitation to the decree-holder for his present application for execution, dated the 20th November 1884.

It seems to me that in arriving at this conclusion the learned Judge omitted to consider whether or not, under the peculiar circumstances of this case, and upon his own findings, the application was not practically an application by the decree-holder under s 258 of the Civil Procedure Code, certifying payment of money out of Court, namely the sum of Rs. 800, to which the endorsement by the decree-holder's pleader on the application itself related. I am of opinion that under the circumstances of this case the application of 20th June 1882, though purporting to have been made on behalf of the judgment-debtors, must by reason of the decree-holder's pleader's endorsement thereupon and the fact that such pleader presented it to the Court, be regarded in effect as an application, not on behalf of the judgment-debtors but on behalf of the decree-holder. I am glad to be able to adopt this view, because it renders t unnecessary for me to consider how far I am prepared to adopt the

rule laid down in *Ghansham* v. *Mukha* (1) that even an application by a judgment-debtor might constitute a step in aid of execution of a decree against himself.

The question then resolves itself into this, whether an application by a *decree-holder* certifying payment under s. 258 of the Civil Procedure Code, and asking the Court to enter partial or total satisfaction of the decree, is an application within the meaning of cl. 4, art. 179, sch. ii of the Limitation Act (XV of 1877).

In the argument upon this point before the Full Bench, much stress was laid upon the analogy of cases such as *Paran Singh* v. *Jawahir Singh* (2) where my brother Straight held that an application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree, is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179, sch. ii of the Limitation Act (XV of 1877). To the same effect is the rule laid down by my brother Tyrrell and myself in *Kishori Lál* v. *Sham Karan* (3) but these rulings were assailed at the hearing on the authority of two rulings of the Calcutta Court. The first of these is *Hemchunder Chowdhry* v. *Brojo Soondury Debee* (4), where it was held by Morris and Tottenham, JJ., that an application made by a judgment-creditor to take out of Court certain moneys there deposited by his judgment-debtor cannot be considered to be an application to the Court to take a step in aid of execution, and is not therefore within the meaning of cl. 4, art. 179, sch. ii of Act XV of 1877. To the same effect is the second case, *Fazal Imam* v. *Metta Singh* (5), where Mitter and Maclean, JJ., expressed their dissent from a ruling of the Madras High Court in *Venkatarayalu* v. *Narasinha* (6). I cannot help feeling that a similar ratio would lead the learned Judges to dissent from another ruling of the Madras Court in *Dharanamma* v. *Subba* (7).

This leads me to consider whether or not the analogy upon which the argument addressed to us has rested is applicable or not.

(1) I. L. R., 3 All., 320.
(2) I. L. R., 6 All., 366.
(3) Weekly Notes, 1882, p. 184.
(4) I. L. R., 8 Calc., 89.
(5) I. L. R., 10 Calc., 549.
(6) I. L. R., 2 Mad., 174.
(7) I. L. R., 7 Mad., 306.

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I am of opinion that it is so applicable, because it seems to me that an action taken by the decree-holders for the purposes of acquiring the fruit of the execution of decree or rather partial fruit of the execution of decree is a step in aid of the execution of decree. There are in the two Calcutta cases which I have cited, no reasons shown why such an application as that contemplated by my brother Straight in *Paran Singh* v. *Jawahir Singh* (1) would not amount to an action which intended not only to aid execution but to acquire the fruits of execution, namely, the recovery of fruits which in execution of decree became the property of him who executed the decree, namely, the decree-holder. I think it is not necessary after the concurrence which the Bench has given to the rule laid down in *Paran Singh* v. *Jawahir Singh* (1) for me to go further into the exact *ratio decidendi* which was adopted by the Calcutta Court in those rulings and in which they laid down the rule inconsistent not only with the rulings of this Court as referred to by my brother Straight, but also with the view taken by the Madras Court upon the same question. I hold therefore that when the decree-holder applies to obtain from a deposit in Court moneys therein deposited as the result of execution sale, he takes a step in aid of execution within the meaning of cl. 4, art. 179, sch. ii, Limitation Act (XV of 1877).

But then what I have said is an argument upon analogy. The exact question before us does not relate to any such application. It relates to an application made by the decree-holder under s. 258 of the Civil Procedure Code certifying that out of Court a certain sum of money had been paid in part satisfaction of the decree, and I say part satisfaction because the application of 20th June 1882 was an application which, as I have interpreted it under the circumstances of the case, could bear no other interpretation. Upon this point the first case to which I wish to refer is the case of *Sitla Din* v. *Sheo Prasád* (2) in which my brothers Straight and Tyrrell agreed in regarding an application of such a character when made jointly by the decree-holder and the judgment-debtor to be an application which would furnish a step in aid of execution of decree. In the referring order I referred to

(1) I. L. R., 6 All., 366. (2) I. L. R., 4 All., 60.

that case as if it was on all fours with the case of *Ghansham* v. *Mukha* (1), but upon reconsideration I find that the case did not undo the principle which I am inclined to hold, namely, that every application to take some step in aid of execution must come from the decree-holder, so that case is no authority against the principle which I have expressed.

The next case is that to which my brother Straight has referred, namely, the case of *Tarini Das Bandopadhya* v. *Bishtoo Lal Mukhopadhya* (2), where Cunningham and Ghose, JJ., concurred in laying down the rule that an application by a judgment-creditor to bring an execution proceeding on the file and to record his certificate of the payment of a sum of money by the judgment-debtor, is an application to take some step in aid of execution of decree within the meaning of cl. 4, art. 179, sch. ii, Limitation Act (XV of 1877).

The ruling was before my brother Tyrrell and myself in *Muhammad Husain Khán* v. *Rám Sarup* (3), and in that case in delivering our judgment I expressed some doubts as to whether or not the rule laid down in that case was sound. In delivering my judgment I think I went further than might have been said in thinking that the case of *Ghansham* v. *Mukha* (1), which I respectfully doubt here, was an authority in support of the proposition which was then expressed. My brother Tyrrell, in expressing his view went further and in the same direction that I did, in expressing doubts as to the validity of the rule laid down by the Calcutta Court in *Tarini Das Bandopadhya* v. *Bishtoo Lál Mukhopadhya* (2).

This is the first case of this Court which required a decision of the proposition that certification of payment out of Court by the decree-holder under s. 258 of the Civil Procedure Code is a step in aid of the execution of decree, and when the order referring this case to the Full Bench was made by my brother Brodhurst and myself we felt that not only my judgment in that case, but also

(1) I. L. R., 3 All., 320.
(2) I. L. R., 12., Calc. 608.
(3) I. L. R., 9 All. 9.

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the judgment of my brother Tyrrell was so liable to be taken as a judgment not settling the law, that such reference was necessary.

The same question, however, came up before me in *Kanhia Lál* v. *Rudar Sahai* (1), where with special reference to the ruling in *Muhammad Husain* v. *Rám Sarup*, (2) I held that before any effect could be given to the execution application for certification such as s. 258 of the Civil Procedure Code requires, it was necessary to decide whether or not such payment had been made as a matter of fact, as distinguished from the mere circumstance of such statement in the application which purported to certify the payment out of Court.

I wish now to say, because the matter has been fully considered by the whole Court, that the doubts which I expressed in *Muhammad Husain Khán* v. *Rám Sarup* (2) in delivering my judgment no longer exist in my mind, and I hold that the rule laid down by the Calcutta Court upon the point in *Tarini Das Bandopadhya* v. *Bishtoo Lál Mukhopadhya* (3) is a sound rule of law, because where a decree-holder has not only out of Court acquired partial satisfaction of his decree, but when he also comes to certify such partial satisfaction under s. 258 of the Civil Procedure Code, he is taking a step by which he asserts enforcement of his decree in the exercise of those powers which are vested in him because he is a decree-holder. The later case, namely, *Kanhia Lál* v. *Rudar Sahai* (1) only supports this view, and following that ruling I hold that where an actual payment has been made by a judgment-debtor in partial satisfaction of the decree, and such payment is certified by the decree-holder by an application made under s. 258 of the Civil Procedure Code, such application is a step in aid of the execution of decree, and as such falls within the purview of cl. 4, art. 179, sch. ii. of the Limitation Act (XV of 1877), provided that the payment asserted in the application for certification was, as a matter of fact, actually made, but that in the absence of the truthfulness of such assertion no such certification is a step in aid of execution of the decree within the

(1) Weekly Notes, 1888, p. 23.
(2) I. L. R., 9 All. 9. (3) I. L. R., 12 Calc. 608.

meaning of the clause of the Limitation Act to which I have referred.

Fortunately in this case the finding of the learned Judge of the lower appellate Court shows that, as a matter of fact, the payment of Rs. 800 mentioned in the application of 20th June 1882, to which the endorsement by the decree-holder's pleader of that date related, was actually made, and I therefore hold that it was a step in aid of execution within the meaning of the article of the Limitation Act to which I have referred. The question then is whether it is necessary to enter into the second point which I pointed out at the outset of my judgment, namely, whether the payment of Rs. 800 to which the application of 20th June 1882 related, can be regarded as payment of "*interest* on a debt," within the meaning of s. 20 of the Limitation Act (XV of 1877) so as to entitle the applicant decree-holder to a "*new period of limitation*" "*to be computed from the date when the payment was made.*" I should have considerable doubt in giving an answer to such a question, though I feel constrained to respect the Full Bench ruling in *Ramhit Rai* v. *Satgur Rai* (1), but it is not necessary to go into the matter further. I agree in the order which has been made.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst and Mr. Justice Mahmood.

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December 2.

SHANKAR SAHAI (PLAINTIFF) *v.* DIN DIAL AND ANOTHER (DEFENDANTS).

Civil Procedure Code, s. 11—*Act XII of* 1881 *(N.-W. P. Rent Act), ss.* 61, 83, 85, 86, 93, *(f)*—*Distress—Suit for declaration of proprietary title in property said to have been wrongfully distrained—Jurisdiction of Civil Court.*

In execution of a decree against the tenants of certain zamíndárs, the plaintiff attached and sold certain trees upon the holding of the judgment-debtors, and the auction-purchaser in turn transferred them to the plaintiff, who obtained possession. Subsequently, one of the judgment-debtors vacated the land on which the trees were situate, and the zamíndárs let the land to another tenant. This last-mentioned tenant having fallen into arrears of rent, the zamíndárs, purporting to act under s. 56 of the North-Western Provinces Rent Act (XII of 1881), distrained some of the trees of which the plaintiff was in possession under his purchase, sold them, and themselves bought them. The plaintiff then brought a suit against the zamíndárs, praying for a declaration of his right to and maintenance of possession of the trees.

(1) I. L. R., 3 All. 247.

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Held that the plaintiff was entitled, under s. 11 of the Civil Procedure Code to bring the suit in a civil Court, and that the civil Courts were not prevented from taking cognizance of it by ss. 83, 85, 93 (*f*) or any other provision of the North-Western Provinces Rent Act (XII of 1881).

THE facts of this case were as follows. The plaintiff, Shankar Sahai, held a decree againt Parshád and Ratan, who were tenants of the principal defendants, Din Dial and Har Dial, zamíndárs. In execution of the decree, the plaintiff caused a number of trees upon the holding of the judgment-debtors to be attached and sold. The zamíndárs objected to the attachment, but their objections were disallowed, and the trees were sold on the 23rd December 1882, and were purchased by one Jawahir, Ahír, who in turn sold them to the plaintiff, who obtained possession. Subsequent to the sale of the 23rd December 1882, the judgment-debtor, Parshád, abandoned his holding, and it was let by the defendants-zamíndárs first to one Mulla and subsequently to Tula.

The defendants-zamíndárs brought a suit against the plaintiff and Jawahir to set aside the sale of the 23rd December 1882, and for cancelment of the deed of sale executed by Jawahir in favour of the plaintiff, and for maintenance of their right to the trees. That suit was ultimately dismissed on appeal, on the 14th May 1884. The zamíndárs twice served the plaintiff with a notice of ejectment under s. 36 of the North-Western Provinces Rent Act (XII of 1881), but on each occasion the Revenue Court cancelled the notice.

On the 5th January 1886, the zamíndárs, purporting to act under s. 56 of the North-Western Provinces Rent Act, distrained 45 guava trees (part of those which had been purchased by the plaintiff in 1882 from Jawahir) with the fruit thereon, for arrears of rent due from the tenant Tula, and on the 9th February 1886 the trees and fruit were brought to sale and were purchased by the zamíndárs themselves.

The present suit was then brought by the plaintiff, Shankar Sahai, for a declaration of his right to and maintenance of possession of the trees, and damages for the appropriation of the fruit. He

joined as defendants to the suit the zamíndárs Din Dial and Har Dial, and the tenant Tula.

The Court of first instance (Munsif of Phaphund) decreed the claim in respect to some of the trees and dimissed it as to others, and also decreed Rs. 5 damages for the fruits misappropriated. It was pleaded by the defendants, *inter alia*, that the suit was not cognizable by a civil Court. The Munsif rejected this plea on grounds which he stated as follows :—

"I find that neither s. 83 (*a*) nor ss. 85 and 90 of Act XII of 1881, nor s. 93 (*f*) of the said Act, which was relied on by the defendant's pleader in the course of his argument, bar the cognizance of this suit by a civil Court, inasmuch as those sections relate to property attached under s. 56 of Act XII of 1881, which allows distress of produce of land in the occupation of a tenant, and not of standing trees, which, as will be noticed in my finding on the fifth and sixth issues, are not included in the produce of land, within the meaning of s. 56 of the Rent Act. The produce of the land to be attached or distrained under s. 56 of the N.-W. P. Rent Act is specified in s. 61 of the said Act, and it appears from the perusal of the latter section that "standing crops and other ungathered products of the earth, and crops or other products when reaped or gathered and deposited in any threshingfloor or place for treading out grain or the like, whether in the field or within a homestead," may be distrained under s. 56, Act XII of 1881. The defendants' act in distraining or attaching the trees in dispute under s. 56 of Act XII of 1881 was quite illegal, and in contravention of the express provisions of the N.-W. P. Rent Act (XII of 1881), and I do not think that they are entitled to benefit by their own act, which is at once illegal and blameable. Though the defendants allege themselves to have attached the trees under s. 56 of Act XII of 1881, that section never allows or gives power to a landholder to attach trees growing on the land in his tenant's occupation. I therefore think that the defendants' act in attaching the trees in dispute of their own authority, under colour of a legal title, is no better than that of a trespasser, and all the proceedings taken by them in distraining or attaching

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the trees and bringing them to sale are *ab initio* null and void, and consequently the cognizance of this suit by a civil Court is not barred by ss. 83 (*a*), 85, 90 and 93 (*f*) of Act XII of 1881. The present suit is, moreover, not prohibited by the terms of ss. 83 (*a*) 85 and 90 of the Rent Act, which simply prescribe a form of procedure to be adopted by a person who claims "as his own, property which has been distrained for arrears of rent alleged to be due from any other person," and s. 93 (*f*) is not applicable, because the proceedings taken by the defendants are altogether void on account of their illegality, and the relation of landlord and tenant does not exist between the parties to the suit. Hence my finding on this issue is that the suit is within the cognizance of the civil Court, and this Court, being a civil Court, has jurisdiction to try it."

The defendants appealed to the District Judge of Mainpuri. The Judge reversed the Munsif's decree and dismissed the suit, on grounds which he stated as follows :—

"I think the jurisdiction of the civil Court is clearly ousted by s. 93 (*f*) of the Rent Act. It is there laid down that "no Courts other than Courts of revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought." One of the classes of suits mentioned is "suits for contesting the exercise of the powers of distress conferred on landholders and others by this Act, or *anything purporting to be done in the exercise of the said power, or for compensation for wrongful acts or omissions of the distrainer.*"

"Now I think it cannot be denied that the action of the landlord, whether right or wrong, in distraining and selling the guava trees and their fruit, purported to be done in the exercise of the powers of distress conferred by the Act, and the plaintiff in the case, might, if he had chosen, have instituted a suit under s. 83 to try the right to the property, or might have sued for compensation under s. 85. I think the use of the expression "*purporting to be done,*" extends the jurisdiction of the revenue Courts to illegal as well as to legal distraints, and as that jurisdiction is an exclusive one, I hold the Munsif had no power to hear the case.

"Had this case been instituted in what I hold to be the proper Court, *i. e.*, in the Revenue Court, no appeal would have lain to this Court, and therefore I think I cannot deal with the case under s. 206, Rent Act. It is unnecessary to go into the other grounds of appeal.

"For the above reason I reverse the decision of the lower Court, and decree the appeal with costs."

The plaintiff appealed to the High Court, on the ground that "the suit was cognizable by the civil Court," and "no Revenue Court could grant the relief claimed in the suit." The appeal came for hearing before Straight, J., who, being of opinion that, "looking to the terms of ss. 83 and 85, the question raised was not without difficulty," referred the case to a Division Bench. Eventually, the Division Bench ordered that the appeal should be heard by the Full Bench, and it was heard accordingly.

Pandit *Sundar Lál* and Munshi *Nawal Behari Bajpai*, for the appellant.

Munshi *Madho Prasád*, for the respondents.

EDGE, C. J.—The plaintiff brought his suit in the civil Court for a declaration of title to trees and produce of trees, and for damages. The plaintiff alleged that the trees and the fruit were his property, and that they had been wrongfully distrained and sold by the zamíndárs, and wrongfully purchased and taken possession of by the defendants, Din Dial and Har Dial. He joined as a defendant one Tula, who was or had been a tenant of the land on which the trees were. The Munsif on the question of jurisdiction held the suit was maintainable in the civil Court. The learned District Judge was of a different opinion, and on appeal dismissed the suit on the ground that the prohibition contained in s. 93, cl. (*f*) of the Rent Act (XII of 1881) barred the jurisdiction of the civil Court. I have, I may say, very great respect for the opinion of the particular District Judge, but I think in this case he hardly appreciated the position of the parties who were before him in the suit. I do not think it necessary to consider whether or not the civil

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Court would have jurisdiction to try this suit if it had been brought against the zamíndár as zamíndár and distrainer. Here we have a plaintiff who says that his property has been wrongfully sold and wrongfully taken possession of by the two principal defendants, in fact the two defendants who have appeared in the suit. In my opinion it does not matter whether those defendants who were sued here for having wrongfully purchased and taken possession of what is alleged to be the plaintiff's property, were the zamíndárs or distrainers or outsiders. I cannot find anything in ss. 83, 85 or 93 of the Rent Act to deprive a civil Court of the general jurisdiction which it has under s. 11 of the Code of Civil Procedure, to hear and determine a suit in which a man says, "my property has been wrongfully converted and taken possession of by the defendants who purchased it."

In my opinion this is nothing more or less than a civil suit maintainable in the civil Court. Pandit *Sundar Lál* has relieved us of the necessity of considering whether the suit, so far as the fruit was concerned, was a Revenue Court suit or a civil Court suit. He has on behalf of his client the plaintiff expressly withdrawn the claim in respect of the fruit. As to the trees not being distrainable, this Court has already previously held on more occasions than one that trees are not subjects of distress. I am of opinion that the appeal should be allowed, the case remanded under s. 562, Civil Procedure Code, to the Court of the District Judge, to be disposed of by the Judge on the merits. Costs will abide the result.

STRAIGHT, J.—The plaintiff in the suit to which this appeal relates, in execution of a decree against two persons of the name of Parshád and Rattan, attached certain trees belonging to his judgment-debtors, and upon the 23rd December 1882, those trees were sold and purchased by one Jawahir, Ahír, who, in turn, for good consideration, assigned them over to the plaintiff, and that is his title.

Subsequently, in the year 1886, Parshád and Rattan having disappeared from the land of which they have been in occupation, and one Tula having been placed in occupation of that land by Din Dial and Har Dial, the zamíndárs, they, upon the 5th January 1886,

purporting to act under the distress chapter of the Rent Act, attached 45 of the trees that had been purchased by the plaintiff in 1882 with the fruits thereon, and on the 9th February 1886 those trees and the fruits were sold and purchased by these defendants for a sum of Rs. 5-8-0 and annas 8 respectively. The plaintiff in the present suit asserts that he was unaware of that sale, and he now comes in, in the civil Court for a declaration of his proprietary title to the 45 trees so distrained and sold, and for the value of the fruits appropriated by the defendants. The latter question is not now before us, and I need not discuss or deal with it.

There were a variety of pleas taken by the defendants to the plaintiff's claim; among others a plea that this was a suit exclusively within the cognizance of the Revenue Court, and that not having been brought in the Revenue Court, the plaintiff could not succeed, and accordingly his claim should be dismissed.

The Munsif, as a Court of first instance, was against that view, and, after discussing all the matters connected with the litigation, came to the conclusion that the plaintiff was entitled to recover in respect to 40 trees, and have a declaration of his proprietary title, as well as to receive Rs. 5, the price of 150 guavas misappropriated by the defendants. There was then an appeal to the District Judge; and he was of opinion that the case was instituted in the wrong Court; that if instituted at all, it should have been in the Revenue Court, and he laid great stress upon cl. (*f*) of s. 93, Rent Act, as read in conjunction with the first paragraph of that section, which excludes the jurisdiction of the civil Court.

As I said in the order of reference, so I repeat now, that unless this suit is prohibited by any positive statutory provision, the civil Court must take cognizance of it. It is immaterial and unnecessary to discuss any question with regard to the plaintiff's right to damages. The case, therefore, stands before us as simply one in which the plaintiff seeks a declaration of his proprietary title to 45 trees which were purchased by the defendants upon the 9th February, 1886. Is that, then, a suit for "contesting the exercise of the powers of distress conferred on landholders and others by this Act,"

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or is it a suit for contesting "anything purporting to be done in the exercising of the said power," or is it a suit "for compensation for wrongful acts or omissions of a distrainer?"

Now, on former occasions in dealing with this section, I took occasion to say that in my opinion cl. (*f*) of s. 93 must be read in reference to, and as limited by, what appears in the preceding chapter relating to distress. It cannot be suggested for a moment seriously that trees upon land are capable of distraint as being within the definition of "standing crops and other ungathered products of the earth," which are liable to distress within the meaning of s. 61, Rent Act, and it could only be in reference to things capable of distress that the provision of chapter IV of the Rent Act could have any application. In every respect the plaintiff's claim appears to me to be one that does not fall within the four corners of the Rent Act. Taking s. 83, upon which so much stress has been laid by the learned Judge, it is clear to my mind that s. 83 contemplates cases in which, prior to a sale having been ordered to take place under a distress, a party comes in and seeks to induce the Court to stay its hand; and that this is so is abundantly clear from the orders that the Court may make; as the statute says his right may be tried "in the same manner and under the same conditions as to the time of instituting the suit and to the consequent postponement of sale, as a person whose property has been distrained for an arrear of rent alleged to be due from him may institute a suit to contest the demand" When we come to look at the following clauses of the section as to what orders can be made, I find nothing to show that those orders when made, would preclude a person from coming into the civil Court to have his title declared. It is only necessary to add that this case does not in my opinion fall within s. 86, Rent Act.

I am therefore of opinion that the order proposed by the learned Chief Justice is the right order, and I would decree this appeal, and, reversing the decree of the learned Judge, I would remand the case for disposal upon the merits.

BRODHURST, J.—I also concur with the learned Chief Justice.

TYRRELL, J.—I concur with the remarks of the learned Chief Justice and my brother Straight.

MAHMOOD, J.—I also concur in the conclusion at which the learned Chief Justice has arrived in this case, and also in what I regard as the turning point of the decision of this case as stated by my brother Straight. I am, however, anxious to indicate the main features of the reasons which have induced me to concur in the order which has been made.

Now, the facts of the case and the nature and scope of the suit are well described in the judgment of the Court of first instance, and their general and important effect has also been already stated by my brother Straight in his judgment, and as to that I wish to add nothing. What, however, seems to me necessary to state is that I attach a very liberal and vast interpretation to the general terms of s. 11 of the Code of Civil Procedure, for purposes of determining the question whether or not suits which are, as a matter of fact, instituted in the civil Court are or are not cognizable by such tribunals. I have before now said that s. 11 is of vast scope, including even what are known as rent-suits or suits cognizable by the Revenue Court, but for the circumstance that such suits, though civil in their nature, are expressly excluded from the jurisdiction of the civil Courts by dint of some special statutes.

In the present case, the solitary statute which has ever been referred to, either by the learned Judge of the lower appellate Court, or in the course of the argument of the case before us in the Full Bench, has been the Rent Act, with special reference to some of its clauses. It is, therefore, relying on that statute that it has been contended that the civil Court has no jurisdiction to entertain this suit at all. In dealing with that matter I wish to call especial attention to the preamble of that enactment, which limits the scope of the whole of that statute to purposes of amending the law by saying that its object was to "amend the law relating to the recovery of rent in the North-Western Provinces of the Presidency of Fort William in Bengal."

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I have held before now that in cases of doubt, and in the absence of express provision to the contrary, the preamble must be taken in restricting and governing the rest of the enactment. In this case I may safely say that the preamble has not been transgressed by anything that the enactment provides in the subsequent sections of which it consists.

Reading the enactment in this light, ss. 83, 84 and 85 upon which so much emphasis was laid by the learned Judge of the Court below, seem to me to provide, what my brother Straight has called a summary remedy, which cannot debar any other remedy which the law allows under the general enactment such as s. 11 of the Civil Procedure Code. I have also before now said that where the law provides two or more remedies, there is no reason to think that the one debars the other; and therefore both must be understood to remain open to him who claims a remedy such as a tribunal of the class that the civil Court is, is called upon to award.

Viewing the case and the points raised therein in this light, the solitary question of importance here seems to me to rest entirely upon the interpretation of cl. (*f*) of s. 93 of the Rent Act, and reading that clause as I have repeatedly done, I have no doubt that it does not debar the ordinary remedy open to a person claiming ownership of immoveable property such as the trees claimed in this case, and does not prevent such property being made the subject of civil suit.

Pandit *Sundar Lál* has withdrawn the claim so far as it relates to the fruit of the trees in dispute, and as to that, I, following the example of my brother Straight, will not say anything further. No process of court such as the Rent Act contemplates can oust the jurisdiction of the civil Courts in suits relating to title to immoveable property. When such a dispute arises over an action pretended to have been taken under some clause or other of that enactment, and is contested upon the ground that the purchaser has purchased nothing, the civil Court is not debarred from saying that that process was wrongfully issued, and that the purchaser

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under it acquired no title, and that the original owner continued to be the owner and could maintain the action.

I shall add nothing beyond saying that I agree in the order that the learned Chief Justice and my brother Straight have made in this case.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

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MADHO LÁL AND ANOTHER (PLAINTIFFS) *v.* SHEO PRASÁD MISR AND OTHERS (DEFENDANTS).

Act XII of 1881 *(N.-W. P. Rent Act), ss.* 9, 93 *(b)*, 94, 206 – *Occupancy tenant—Mortgage of occupancy holding—Such mortgage not an "act inconsistent with the purpose for which the land was let"—Suit to eject mortgagee in possession—Jurisdiction of civil Court—Appeal—Objection to jurisdiction not taken in first Court.*

A mortgage of his holding by an occupancy tenant, under which the mortgagee obtains possession, is not an act "detrimental to the land" or "inconsistent with the purpose for which the land was let," within the meaning of s. 93 (*b*) of the N.-W. P. Rent Act (XII of 1881). An act detrimental to the land means an act which injures the land itself. An act inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering the character of the land, as, for instance, turning it from agricultural land to building land.

But a mortgage with possession, whether the possession is given at the time of the granting of the mortgage, or is obtained later by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the N.-W. P. Rent Act.

A suit by the zamíndár to eject the mortgagee of an occupancy holding or his representatives in possession, does not fall within ss. 93 (*b*) and 94 of the N.-W. P. Rent Act, but is cognizable by a civil Court, under the rules of limitation applicable to suits in such Courts.

Under s. 206 of the N.-W. P. Rent Act, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction is not to be entertained in the appellate Court, but the Judge must try the case upon the facts, and apply the law applicable to those facts. *Debi Saran Lál* v. *Debi Saran Upadhia* (1) approved.

THE facts of this case were as follows. The defendant, Sheo Prasád, held 8 bighas 12 biswas and 5 dhurs of land in mauza Deokali as an occupancy holding, and on the 18th August 1877 he executed a simple mortgage of the holding in favour of one Mahip

(1) I. L. R., 6 All., 378.

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Singh for Rs. 399. The deed was registered on the 8th September 1877. By the deed it was agreed that the mortgagor should remain in possession, and that, if the mortgage-money with interest should not be paid in five years, the mortgagee should be put in possession and should thenceforth take the profits in lieu of interest until the whole principal and interest were paid.

The mortgagor having made default in payment of the mortgage-money with interest, the heirs of the mortgagee brought a suit for possession of the holding in accordance with the mortgage-deed, and on the 21st March 1883 they obtained a decree, under which they obtained possession on the 18th November 1885.

The present suit was instituted on the 28th April 1886 by Madho Lál and Sadho Lál, zamíndárs of the occupancy holding mortgaged; and it purported to be brought under s. 93 *(b)* of the North-Western Provinces Rent Act (XII of 1881), for the ejectment of the heirs of the mortgagee. The mortgagor, Sheo Prasád, also was made a defendant. The suit was brought in the Court of the Assistant Collector of Jaunpur.

One of the pleas taken by the defendants was that the suit was barred by the limitation of one year prescribed by s. 94 of the North-Western Provinces Rent Act. No objection was taken that the suit was not cognizable by a Revenue Court. The Court of first instance held that the cause of action arose on the 8th September 1877, the date on which the deed of mortgage was registered; that the plaintiffs became aware of the execution of the deed at a time considerably more than one year before the 28th April 1886, when the suit was instituted; and that under s. 94, the suit was barred by limitation. The Court further held that the mortgage executed by the occupancy tenant, Sheo Prasád, was an act "inconsistent with the purpose for which the land was let" within the meaning of s. 93 (*b*) of the North-Western Provinces Rent Act.

The plaintiffs appealed to the District Judge of Jaunpur, who held that s. 93(*b*) was applicable; that the suit should, under s. 94, have been brought within one year from the date of execution of the mortgage-deed; and that, not having been so brought, it was barred

by limitation. He accordingly dismissed the appeal. No objection to the effect that the suit was not cognizable by the Revenue Court was raised before him.

The plaintiffs presented a second appeal to the High Court. The appeal came on for hearing before Edge, C.J., and Brodhurst, J., who passed the following order :—

"Having regard to the decisions in *Debi Prasád* v. *Har Dayal* (1), *Fatima Begam* v. *Hansi* (2), and *Gopal Pandey* v. *Parsotam Das* (3), we think that this case should be heard by a Full Bench of five Judges. With the consent of Mr. *Juala Prasád* for the appellants and of Mr. *Kashi Prasád* for the respondents, we order that this appeal be heard by a Full Bench."

Munshi *Juala Prasád*, Munshi *Madho Prasád* and Munshi *Sukh Rám*, for the appellants.

Munshi *Kashi Prasád*, for the respondents.

EDGE, C. J.—This was a suit brought in the Rent Court by the zamíndárs for ejectment under s. 93, cl. (b), of the Rent Act (XII of 1881). The defendants were the occupancy tenant, who was out of possession, and the heirs of his mortgagee, who had obtained possession under the mortgage to the mortgagee. There was no objection raised in the first Court as to the jurisdiction of that Court, nor in fact was there any objection of that kind raised in the appellate Court. On appeal the District Judge dismissed the suit, holding that the period of limitation applicable to the suit was one year, and that the cause of action arose on the making of the mortgage in 1877. If the 12 years was the period of limitation applicable, the suit was in time. We have to consider whether this was a suit which must be brought in the civil Court, because on the decision of that question depends the question as to whether the Judge was right in applying the period of one year's limitation to the suit. The meaning of cl. (b) of s. 93 of the Rent Act has been from time to time discussed in the Benches of this Court, and I think I am justified in saying that now

(1) I. L. R., 7 All., 691. (2) I. L. R., 9 All., 244.
(3) I. L. R., 5 All., 121.

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we are all agreed as to the meaning of that section, so far as a case of this kind is concerned, and in the view that I am about to express I think I am expressing the opinion of my brother Judges on the Bench. In our opinion, an act is not detrimental to the land, within the meaning of that clause, unless it injures the land itself. It is quite plain that the making of a mortgage would not in itself injure the land within the meaning of cl. (*b*). An act, to be inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering of the character of the land, as, for instance, by turning it from agricultural land to building land. The mere granting of a mortgage cannot be an act inconsistent with the purpose for which the land was let.

The plaintiff's case is that this is an occupancy holding, and if Sheo Prasád was an occupancy tenant, he became an occupancy tenant by virtue of the application of s. 8 of the Rent Act, and there is nothing appearing here to show that, when he originally became a tenant, or during any part of his tenancy, there was any agreement between the zamíndár and him by which his present act was inconsistent with the purpose for which the land was let. Consequently I am of opinion that the act of mortgaging which was relied upon here was not, within the meaning of cl. (*b*), an act detrimental to the land, or inconsistent with the purpose for which the land was let.

It is another question altogether whether this mortgage, under which the mortgagee obtained possession of the land, was not an act inconsistent with the provisions of s. 9 of the Rent Act itself, so far as its validity was concerned. On that point also we are all agreed, and I think I am expressing the opinion of the rest of the Court in saying that, at any rate, a mortgage with possession, whether the possession is given at the time of the granting of the mortgage or is obtained later under the mortgage by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the Rent Act (XII of 1881).

Under these circumstances I am of opinion that this was a suit for the civil Court, and that we must allow this appeal to this

extent, that the case will have to be sent back to the District Judge of Jaunpur to be replaced on his file of pending appeals and to be disposed of by him according to law. I may only say that I agree with what was said by my brother Straight as to the effect of s. 206 of the Rent Act in the case of *Debi Saran Lal* v. *Debi Saran Upadhia* (1). He there says: "Under s. 206, if such an objection was not taken in the first Court, the appellate Court is to disregard it and to dispose of the appeal independent of all considerations as to whether the first Court had or had not jurisdiction." As I understand that judgment, my brother Straight meant, and I think rightly, that, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction was not to be entertained in the appellate Court, and the Judge must try the case upon the facts, and apply the law applicable to those facts. The case is remanded, and costs will abide the result.

STRAIGHT, J.—The defendant, Sheo Prasád, on the 18th August 1877, executed a mortgage of what for the purposes of this decision must be regarded as an occupancy holding. The term of that mortgage was that the mortgagor was to remain in possession as before, and that if, at the end of the period of five years, the mortgage-money was not paid up with interest, the mortgagee should take possession of the occupancy holding. The mortgagor did not pay up the mortgage-money with interest, and consequently the mortgagee had to bring a suit for possession, in which he obtained a decree upon the 21st March 1883. In execution of that decree the mortgagee obtained actual possession upon the 18th November 1885, and he was admittedly in possession at the date of the institution of the present proceeding upon the 28th April 1886.

Now this suit, whatever be the particular forum that had special cognizance of it under the law, was a suit that was mainly directed to the displacement of the mortgagee in possession, and that displacement could only take place by reason of showing that the act of the occupancy tenant in putting him in possession was either illegal, that is to say, contrary to the provisions of the statute or

(1) I. L. R., 6 All., 378.

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of a character detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let. If the act of this making of the mortgage and giving possession under it was in the latter category, then the suit properly fell within cl. (*b*) of s. 93 of the Rent Act. If it fell within the former category, it was undoubtedly a civil suit for a civil Court, and I desire to say most emphatically that, in my opinion, the jurisdiction of the civil Court to entertain suits of a civil nature should not be excluded unless the language is so clear and specific that there can be no doubt about it that a particular Court of limited jurisdiction was intended to have sole cognizance of the particular proceeding.

In this present case it is quite obvious from the facts, as stated in the plaint, that what the plaintiff complained of was that a trespasser, in the shape of a person who had no right upon the land within the ambit of his zamíndári, which land ought to have been occupied by his occupancy-tenant, was in possession of that land, and his sole object was to get that person out. It was idle to suggest that it was a suit for the ejectment of the occupancy tenant, because he was not in possession, and an order of ejectment as against him in the summary shape that is provided for by the Rent Act would have been a *brutum fulmen*, because the mortgagee would have remained in possession and could not have been moved by any order of the Rent Court. Such being the shape of the suit, it is true that no objection was taken when it came before the Revenue Court, that it was a civil suit, and so far no difficulty could arise. But it went in appeal to the learned Judge, and that officer, because he fills the position of a Court of appeal in certain rent cases, and as the civil Court of appeal of highest subordinate character under our jurisdiction, had the power to deal with this case under the statute; according as he found it to be a rent suit he was to deal with it as a rent suit and apply the rules and the strict rules of limitation of the rent law, on the other hand, if he found it to be a civil Court suit, he was bound to apply the rules of limitation and the law applicable to the trial of civil suits. In the case to which the learned Chief Justice has

referred, and it is a satisfaction to me to know that he approves what I then said, I took some pains to define in very clear and intelligible language what is the specific and precise operation of these particular sections of the rent law, that is to say ss. 206, 207 and 208 of the Rent Act, and as to what are the precise powers that a Judge sitting in appeal has in dealing with cases thereunder. The learned Judge, when this case came before him, disclosing the matters which I have mentioned as appearing upon the plaint, the statement of defence and the evidence, should have treated this as a civil suit, namely, as a suit brought by the plaintiff for the purpose of recovering possession from a trespasser in the person of the mortgagee, who, under a document that was not worth the paper it was written upon, because void under the rent law, had obtained possession.

Then if that was the form in which he should have regarded the suit, he was wrong in applying the shorter period of limitation, and it was his business to find out what was the ordinary limitation applicable to this case. Under these circumstances, as he has not done so, he must be told to do so, and the case must be put into train to enable him to do what the law required him to do. I entirely concur with the learned Chief Justice that this is a civil Court suit; that the limitation applicable to the suit is the limitation applicable to civil suits, and the case should be remanded under s. 562, Civil Procedure Code, to the Court of the District Judge for restoration to his file of pending appeals and disposal according to law. Costs will follow the result.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I concur with the learned Chief Justice and my brother Straight.

MAHMOOD, J.—I have no doubt, notwithstanding some rulings of this Court to the contrary, that a mortgage by an occupancy tenant, in spite of the prohibition against transfer contained in s. 9 of the Rent Act (XII of 1881), and corresponding section preceding that enactment in the same behalf, is not an act detrimental to the

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land, or inconsistent with the purpose for which the land was let within cl. *(b)* of s. 93 of the present Rent Act, or the Act which in that behalf preceded it. This is the effect of what I held in *Debi Prasád* v. *Hardayal* (1), and my ruling in that case was approved by the present learned Chief Justice in *Fatima Begum* v. *Hansi* (2). The suit here was therefore a civil suit, whether the mortgage of the 18th August 1877 was or was not valid under the rent law, and reading ss. 206, 207 and 208 of the Rent Act together, I have no doubt, following the ruling of my brother Straight in *Debi Saran Lál* v. *Debi Saran Upadhia* (3), that the District Judge should have decided the case upon the merits. I therefore agree in the order made by the learned Chief Justice.

Cause remanded.

1889. *December 5.*

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

SAFDAR ALI (DEFENDANT) v. DOST MUHAMMAD AND ANOTHER (PLAINTIFFS).

Pre-emption—Wajib-ul-arz—"Co-sharer,"—Purchaser of isolated plot of land in mahál—Purchaser of sír land.

The *wajib-ul-arz* of a village gave a right of pre-emption to "co-sharers in the mahál." One of the co-sharers brought a suit for pre-emption which the vendee-defendant resisted on the ground that he also was a co-sharer in the mahál, and the plaintiff had therefore no preferential right. This contention was based on a former purchase by the defendant under a deed of sale executed by a co-sharer, and comprising (i) an isolated plot of land in the mahál, (ii) sír lands in the mahál.

Held by the Full Bench that it being found that the vendee defendant had already become a co-sharer in the mahál prior to the date of the purchase which was in question in the suit, the plaintiff had no preferential right of pre-emption.

Per Mahmood, J.—The decisions of the Full Bench in *Niamat Ali* v. *Asmat Bibi* (4) and *Sital Prasád* v. *Amtul Bibi* (5) have overruled *Hazari Lál* v. *Ugrah Rai* (6) and *Rup Rám* v. *Mangni* (7).

This was a second appeal from a decision of the Subordinate Judge of Allahabad. The facts are fully stated in the judgment of the lower appellate Court, which was as follows:—

(1) I. L. R., 7 All., 691.
(2) I. L. R., 9 All., 244.
(3) I. L. R., 6 All. 378.
(4) I. L. R., 7 All. 626.
(5) I. L. R., 7 All. 633.
(6) Weekly Notes, 1884, p. 103.
(7) Weekly Notes, 1886, p. 136.

"This appeal arises in a suit brought by the respondent to enforce his right of pre-emption under the *wajib-ul-arz* in respect of a sale of a 10 kirants share in mauza Kathaula, effected by one Sital Prasad in favour of the appellant, on the 13th September 1886. The amount of sale-price mentioned in the sale-deed is Rs. 300. The village Kathaula has been partitioned and formed into several pattis. The disputed share appertains to patti Karim Bakhsh. The plaintiff is the owner of the patti which stands in his own name. The plaintiff stated that the real purchaser of the share was Yar Muhammad, brother of the appellant; that both of them were strangers; and that he (plaintiff) had a right of pre-emption. He alleged the actual amount of consideration for the sale to be Rs. 175.

"The defendant-appellant pleaded *inter alia* that he was a co-sharer in patti Rajjab Ali, and that the plaintiff had no preferential right of purchase.

"It appeared that by a sale-deed, dated 5th May 1884, Rajjab Ali sold to the appellant, out of a 7 pie 10 kirants share of zamíndári, 10 bighas of land bearing a revenue of Rs. 10 a year, together with all rights appertaining thereto. It is by virtue of this purchase, that the appellant claimed to be a co-sharer. The lower Court has found that, with the exception of one piece of land, the remainder of the 10 bighas aforesaid was the *sír* of Rájjab Ali. It is of opinion that a purchaser of *sír* lands is not a co-sharer, and that therefore the purchaser-defendent is not a co-sharer. It has accordingly passed a decree in the plaintiff's favour for possession, conditional upon his paying Rs. 300, which it holds to be the correct amount of sale consideration.

"The defendant purchaser has appealed, and the plaintiff has preferred objections under s. 561 of the Code in regard to the sale consideration.

"The principal question which arises in appeal is whether Dost Muhammad, the purchaser, became a co-sharer in the mahál by right of his purchase from Rajjab Ali.

"The *wajib-ul-arz* is in these terms: "When a *hakiat* is transferred for the price which a stranger might give, the right of pre-emp-

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tion will vest, first, in co-sharers *ek jaddi, i.e.*, descended from the same stock, next in partners in the share (*sharik hissadar*), and lastly in co-sharers in the mahál.

"It is admitted that the plaintiff is not an *ek jaddi* co-sharer. It is also clear that he is not a partner in the share sold, as the said share is in patti Karim Bakhsh, and he owns patti Safdar Ali. He is therefore a pre-emptor of the third class specified in the *wajib-ul-arz*, and if it be found that the appellant is a co-sharer in patti Rajjab Ali, the plaintiff will not have a superior right to purchase the property.

"As I have stated above, Rajjab Ali sold to the appellant 10 bíghas of land out of his 7 pie 10 kirants share. The sale-deed gives a detail of the said land as follows :—

	Big.	Bis.
No. 225,	3	0
„ 774,	0	15
„ 989,	2	4
„ 990,	1	19
„ 1110,	1	16
„ 1717,	0	6
Total ...	10	0

"It has been proved that, with the exception of land No. 1110, the other pieces of land were recorded as the *sír* of Rajjab Ali, and may be assumed to have been his *sír*. The land No. 1110 is the occupancy holding of Dilawar Husain, a tenant.

"The lower Court holds that by purchasing specific pieces of land, most of which were the *sír* of his vendor, the appellant did not become a co-sharer in the village, and as an authority for this view it relies upon the ruling of the hon'ble High Court in *Hazari Lál* v. *Ugrah Rai* (1).

"I am of opinion that the above ruling is not strictly applicable to this case, inasmuch as the property sold to the appellant consisted not only of *sír* lands, but also of a piece of land in which the vendor

(1) Weekly Notes, 1884, p. 103.

had nothing more than a proprietary right. Therefore, irrespective of the *sír* lands, the appellant acquired by his purchase the proprietary right of his vendor in respect of one piece of land No. 1110, and thus became a co-sharer in the mahál. This is a much stronger case than that of *Gokal Singh* v. *Mannu Lál* (1), and the principle laid down in it applies with equal, if not greater, force to this case.

"I am of opinion that the purchase of the remaining pieces of land also made the appellant a share-holder in the mahál. It appears that his vendor, Rajjab Ali, was the sole owner of a patti of that name. The said patti consisted of a 7 pie 10 kirant share comprising 138 bíghas 9 biswas 8 dhurs, bearing a revenue of Rs. 115-3-9. He was the sole owner of the whole of this land, and therefore he was competent to part with his proprietary right in any part of the said land. After the sale to the appellant, his name is entered in the *khewat* as a co-sharer in patti Rajjab Ali, owning 10 bíghas, and liable for a revenue of Rs. 10-0-9, and the name of Rajjab Ali himself is entered in respect of the remaining 128 bighas 9 biswas 8 dhurs, bearing a revenue of Rs. 105-3-0. The appellant has thus been recognised in the *khewat* as a co-sharer in patti Rajjab Ali, which is a part of an entire mahál containing 3,632 bíghas 1 biswa 10 dhurs of land, and assessed with a revenue of Rs. 2,950. He is thus a co-sharer in the mahál.

"The lower Court is of opinion that it is only when a person purchases a specific share in a zamíndári, with all the appurtenances thereto, that he becomes a co-sharer in it. This view is opposed to the ruling of the Full Bench in *Niamat Ali* v. *Asmat Bibi* (2), and is evidently unsound law.

"It was no doubt held in the case of *Hazari Lál* v. *Ugrah Rai* (3) that the sale of *sír* lands did not give rise to a right to claim pre-emption, and could not be regarded as a transfer of a share in the zamíndári. But that ruling was virtually overruled by the Full Bench in *Sital Prasád* v. *Amtul Bibi* (4), and the Hon'ble Mr. Justice Mahmood held that "the *sír* lands of a joint co-sharer in a mahál

(1) I. L. R., 7 All., 772.
(2) I. L. R., 7 All., 626.
(3) Weekly Notes, 1884, p. 103.
(4) I. L. R., 7 All. 633.

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form an essential part of his proprietary right in the mahál, and that he can sell his proprietary right in such lands, much in the same manner as he could have sold the whole of his share." The other learned Judges were of the same opinion, with some qualifications which do not apply to this case. According to the *ratio decidendi* of this ruling, the sale of *sír* lands is a transfer of a part of the proprietary rights in the mahál to which the said lands appertain, and therefore the purchaser of such land becomes a proprietor in the mahál. Consequently, the appellant, by purchasing the *sír* lands of Rajjab Ali, became a shareholder in the mahál, and as the plaintiff had no higher rights than those of a shareholder in the mahál he had no preferential right of pre-emption, and his claim was untenable.

"It has not been contended in this Court that the appellant is not the actual purchaser of the disputed property, and no evidence was adduced on the point in the Court below.

"The appeal is accordingly decreed. The decree of the Court below is set aside, and the plaintiff's claim is dismissed with all costs. The objections under section 561 are necessarily disallowed."

The appeal came on for hearing before Mahmood, J., who referred it to a Division Bench. The Division Bench (Straight and Brodhurst, JJ.,) referred it to the Full Bench.

The Hon. Pandit *Ajudhia Nath*, Pandit *Bishambhar Nath*, Munshi *Rám Prasád*, and Maulvi *Zahur Husain*, for the appellant.

Pandit *Sundar Lál*, for the respondent.

EDGE, C. J.—This is an appeal by a plaintiff in a pre-emption suit. He brought his suit on the allegation that the vendee was a stranger in the mahál within the meaning of the *wajib-ul-arz*. It is found as a fact that the vendee had already become a sharer in the mahál prior to the date of the purchase which is in question in the suit. That is the only point in the case. Upon that finding the plaintiff's appeal must be dismissed, and the decree below dismissing the suit confirmed with costs.

STRAIGHT, J.—I concur.

BRODHURST, J.—I concur.

TYRRELL, J.—I concur.

MAHMOOD, J.— This case would not have required reference to a Full Bench of this Court but for the reason that there were conflicting judgments of the various Benches of this Court to which the learned Judge of the lower appellate Court has referred, and also others, on the question whether the purchase of an isolated piece of ground within the limits of a mahál does not constitute such purchaser or owner a co-sharer in the village for purposes of enforcing the pre-emptive right under the pre-emptive clause of the *wajib-ul-arz* governing such mahál.

It is needless for me either to wait to find out all those rulings or to dwell upon them with any greater minuteness than by saying that so many of those rulings as lay down the proposition that the purchase of a piece of land in the *abadi* area of a village or mahál is not a co-sharer in the village or mahál, and, also those laying down that the purchaser of specific fields of *sír* land does not become a co-sharer of the village or mahál for the purposes of exercising the pre-emptive right, are based (I say this with profound respect) upon a misapprehension of the nature and incidents of the *zamíndári* tenure as understood in this country. The reasons for this view were stated by me in my dissentient judgment in the Full Bench case of *Sahib Rám* v. *Kishan Singh* (1), which was referred to in the later Full Bench case of *Niamat Ali* v. *Asmat Bibi* (2) as to an isolated piece of grove-land, and the ruling of the whole Court proceeded upon a *ratio* which I cannot distinguish from the principle of my dissentient judgment in the former case. Nor is the Full Bench ruling in *Sital Prasád* v. *Amtul* (3) as to *sír* lands distinguishable. These rulings must be understood to have overruled earlier rulings which proceed on the contrary principle: *Weekly Notes*, 1884, p. 103; *Weekly Notes* 1886, p. 136. In the present case I have no doubt that although this one plot of land, No. 110, was an isolated piece of land, and the rest was *sír* land, the defendant's

(1) Weekly Notes, 1882, p. 192.
(2) I. L. R., 7 All., 626.
(3) I. L. R., 7 All., 633.

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purchase of 5th May 1884 conferred upon him the right of pre-emption, because he became a co-sharer in the village. The sale in his favour of 13th September 1886 cannot, therefore, be assailed by the plaintiff, and it would be delaying my judgment if I said anything more than that the judgment delivered by the learned Judge of the lower appellate Court meets with my full approval, and that in that light I would dismiss this appeal with costs as the learned Chief Justice has suggested.

Appeal dismissed.

1889 *December 6.*

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* FATEH SINGH.

Harbouring an offender—Act XLV of 1860 *(Penal Code) s.* 212.

To justify a conviction under s. 212 of the Penal Code, it is necessary that there should be an offence committed, and consequently an offender who has been harboured or concealed. *Empress* v. *Abdul Kadir* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Straight, J.

The appellant was not represented.

The *Government Pleader* (Munshi *Rám Prasád*), for the Crown.

STRAIGHT, J.—This case was sent for by me upon a perusal of the Sháhjahánpur Judge's sessions record for the month of August, and since then the accused person has filed an appeal. I am of opinion that the conviction cannot be sustained. The charge against the appellant was that provided for in s. 212 of the Penal Code, that is to say, it was alleged that one Sita Rám having been murdered, the appellant knowing or having reason to believe that one Reoti was the murderer, harboured and concealed that person with the intention of screening him from legal punishment. Now, it is obvious for the purpose of constituting an offence under that section that three positions should be established. First, that there should have been an offence committed, and consequently that there

(1) I. L. R., 3 All., 279.

should be an offender; secondly, that there should be a harbouring or concealing of the person known or reasonably believed to be the offender; and thirdly, that such harbouring or concealing should be done with the intention of screening that person from legal punishment.

Under s. 201 of the Penal Code, which contains a somewhat analogous provision, a Full Bench of this Court in *Empress* v. *Abdul Kadir* (1) expressed in no uncertain terms that an essential ingredient to a conviction under that section was that an offence should have been committed for which some person had been convicted or was criminally responsible. In my judgment in that case I took occasion to state what appeared to me to be the full extent and the extreme length to which that section should be carried. If it was essential for the purpose of a conviction under that section that there should have been an offence *committed, a fortiori* under s. 212 that element is imperatively necessary, and indeed in my opinion the words of s. 212 leave no room for doubt upon that point. I have read all the evidence in this case both upon the trial of the appellant and upon the trial of Reoti; and it does not appear to me, and in this view the learned Government Pleader agrees, that there is any proof to show that the death of Sita Rám was caused by the unlawful act of any person. Reoti was tried for that offence and unhesitatingly acquitted, and for aught that appears to the contrary, the death of Sita Rám, though no doubt caused by violence, may have taken place under circumstance which would have rendered it no crime on the part of the person who caused his death. It is therefore sufficient for the purpose of disposing of this case to say that there is no proof upon this record that any offence had been committed. That being so, it becomes unnecessary to enter into the question whether the other two ingredients going to constitute the offence under s. 212 are to be found in the evidence. I allow the appeal, and, reversing the learned Judge's conviction and sentence, I acquit Fateh Singh and direct that he be released.

Conviction set aside.

(1) I. L. R., 3 All., 279.

1889
December 7.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* PIRTHI AND OTHERS.

Practice—Revision—Criminal Procedure Code, s. 437—Order of Sessions Judge rejecting application under s. 437—Subsequent order of District Magistrate granting similar application.

Where a Sessions Judge has passed orders under s. 437 of the Criminal Procedure Code, a District Magistrate acting under the same section should not pass orders of a contrary kind, but if he thinks that the Judge's orders were wrong, he should submit them to the High Court through the medium of the Public Prosecutor. *Queen-Empress* v. *Shere Singh* (1) referred to.

Where a Sessions Judge had, under s. 437 of the Criminal Procedure Code, refused to order further inquiry into the case of an accused person who had been discharged, the High Court set aside a subsequent order of the Magistrate of the district passed under the same section and ordering further inquiry into the same case.

The facts of this case which was a reference under s. 438 of the Criminal Procedure Code, by the Sessions Judge of Sháhjahánpur, are sufficiently stated in the judgment of Straight, J.

The *Public Prosecutor* (Mr. *C. H. Hill*), appeared for the Crown.

STRAIGHT, J.—The learned Judge has very properly referred this matter to the Court, because it is obvious that unless some rule is laid down for the guidance of the Sessions Judges and Magistrates, considerable confusion and conflict of decision would arise. The facts here are these. Certain persons were charged before a Magistrate with the offences of riot and causing grievous hurt; and after a careful inquiry the Magistrate discharged them in the manner provided by law. The complaining parties then went to the Sessions Judge, and he, after considering the matter, came to the conclusion that he ought not to interfere with the order of discharge or direct further inquiry under the powers conferred upon him by s. 437 of the Criminal Procedure Code. Having failed to move the learned Judge in the matter, the complaining parties went to the District Magistrate; and whether he did or did not know of the learned Judge's order, it appears to me indifferent for the deter-

(1) I. L. R., 9 All., 362.

mination of this question, save that I would observe that if he did know of it, it was a somewhat strong step on his part to take the action that he did. In the result the Magistrate thought proper to direct a further inquiry, and that further inquiry was to be made by another Magistrate. It will thus be obvious that here are two orders on the same materials directly opposed the one to the other; that is to say, the learned Judge's order refusing to direct a further inquiry and the subsequent order of the District Magistrate granting a further inquiry.

Now, it is quite impossible that this condition of things could be approved by this Court; and although I am not prepared to say that the language of s. 437 of the Criminal Procedure Code left the District Magistrate absolutely without jurisdiction when once the matter was disposed of by the District Judge, I am nevertheless of opinion that it is a most inconvenient thing that when once a matter of this kind has gone to the District Judge and he has passed orders one way or the other, the District Magistrate should take the matter into his hands and pass orders of an exactly opposite kind. Mr. *Hill*, who was good enough to look into this matter at my instance, it being one of some considerable importance, yesterday called my attention to some remarks made by me on a reference in a somewhat analogous matter—*Queen-Empress* v. *Shere Singh* (1). I have had the advantage since yesterday of consulting the learned Chief Justice upon this point, and he entirely agrees with me that what I pointed out in that case as the desirable practice to follow in matters of that description will be well adapted to and followed in matters of the present kind. I think, therefore, the most convenient course for me to adopt here will be to set aside the order of the Magistrate of the district; but to leave it open to him if so advised, to submit to this Court the order of the learned Sessions Judge declining to direct further inquiry under s. 437 of the Criminal Prosedure Code through the medium of the learned Public Prosecutor, by which means he will have the benefit of the learned Public Procecutor's advice as to whether the case is one in which the somewhat unusual step is prayed, namely, that an order of discharge of

(1) I. L. R., 9 All., 362.

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QUEEN-EMPRESS v. PIRTHI.

a person which has been granted should be set aside and the proceedings re-opened. It will be convenient to add as by way of guidance to the District Magistrate that this appears to me to be the most convenient course to pursue so as to avoid that conflict of orders in a district which will otherwise arise. I set aside the Magistrate's order directing the further inquiry; and until it is assailed by any proceedings by the Magistrate through the medium of the learned Public Prosecutor, the learned Judge's order will stand.

Order set aside.

1889. *December* 10.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

SHADI AND ANOTHER (DEFENDANTS) *v.* ANŪP SINGH (PLAINTIFF.)

Co-sharers—Dealing with joint property—Building by one co-sharer against the wish of others— Suit for injunction to restrain building—Discretion of Court—Act I of 1877 *(Specific Relief Act), s.* 54.

One of several co-sharers in a mahal having begun to erect certain kachcha buildings upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him on partition, and that on partition the plaintiff could not be adequately compensated.

Held by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time. *Paras Rám* v. *Sherjit* (1) referred to.

Per Straight, J., that it was for the defendant-appellant to show that the lower appellate Court had exercised a wrong discretion in granting the injunction, and that, this not having been shown, the High Court ought not to interfere.

THE facts of this case are sufficiently stated in the judgment of Edge, C.J. The case was referred to the Full Bench by the Chief Justice on the recommendation of Mahmood, J., with reference to the judgment in *Paras Ram* v. *Sherjit* (1).

Mr. *Khushwakht Rai*, for the appellants.

(1) I. L. R., 9 All., 661.

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasád*, for the respondent.

EDGE, C.J.—In this case one of the sharers in a *mahál* brought a suit to restrain the defendant, who is also a sharer in the *mahál*, from continuing to erect certain buildings upon the common ground belonging to the co-sharers. The suit was brought within three or four days after the defendant had commenced to erect his *kachcha* buildings. The defendant's case was that the land in question was his own exclusive property, that he had a right to it, and consequently a right to exclude the plaintiff and other co-sharers from any participation in or enjoyment of the land in question. The plaintiff's case, in fact, was that the defendant was ousting him, a co-sharer, from a portion of the common land. An *interim* injunction was granted in the case, and on appeal the District Judge, having regard to the ruling of my brother Mahmood in *Paras Rám* v. *Sherjit* (1), went into the question as to whether on partition the plaintiff could be compensated for the interference with his rights by the defendant, and he found that the defendant was building upon land which was in excess of the share that would come to him on partition, and that on partition the plaintiff could not be adequately compensated. Now this finding of fact would in my judgment have entitled the plaintiff to a mandatory injunction to pull down the buildings even if they had been built, assuming that they had been built without the acquiescence of the plaintiff. But in my opinion it was unnecessary to go into the question as to whether or not the defendant was appropriating more of the common lands than would have come to him on partition. The law provides the means by which common lands may be lawfully partitioned in a proceeding in which all the co-sharers will get their fair *quantum* of the common land, having regard to possession, quality and the amount of their shares. In this case the defendant without having recourse to the Courts to give him lawful partition, proceeded to appropriate to himself lands in which each of his co-sharers had an interest, and thus he proposed to exclude

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his co-sharers from all use and enjoyment of a portion of common land. We need not in this case consider what a civil Court should do if the defendant has erected at great expense buildings which a Court of equity might hesitate to order him to pull down. All we have got to consider is that almost instantly on the unlawful attempt of the defendant to appropriate, and, in fact, to make partition on his own behalf, one of the co-sharers invoked the assistance of the civil Court to prevent the defendant from interfering with his rights as a co-sharer. In may opinion the plaintiff is entitled to a perpetual injunction. I would dismiss the appeal with costs.

STRAIGHT, J.—It is found by the lower appellate Court that 3 bighas, 8 biswas of land on a part of which the defendant Shadi has commenced to make certain erections, was *shamilat* land, the common property of himself, the plaintiff and other persons. It is clear that almost immediately after the commencement of these erections the plaintiff with expedition went to the civil Court and asked the Court to restrain the action of the defendant Shadi, and obtained an interim injunction to that effect. It has been found by the learned District Judge that the land built upon and occupied by the defendant Shadi was greatly in excess of his share; that his action in commencing the erections upon the land had caused injury, and if allowed to be continued would cause injury to the plaintiff that could not be possibly remedied by partition. Holding this view, and upon these facts, the learned Judge below in the exercise of the discretion vested in him by law has granted a mandatory injunction restraining the defendant from proceeding further with the building, and directing the building, so far as it had proceeded, to be pulled down, and prohibiting the defendant from building upon the land as exclusive owner at any future time. This second appeal, which has been referred to the Full Bench, attacks the discretion exercised by the learned Judge, and before I could interfere in a case of this kind I should require the appellant to satisfy me that the discretion has been improperly exercised. Now I am not going at length into the numerous cases that are to be found in our law reports and in the Calcutta series bearing upon the question. I take it that the

rules for our guidance are to be found in chapter X, Specific Relief Act, ss. 54 and 55. The English cases to which reference can be made are, after all, only of use as illustrative of the principles embodied in those sections from the aspect that the Courts of Chancery in England have had to treat matters of a similar description. It is purely a question of discretion whether the Court can grant relief of this description, and I hold that unless I am satisfied that the District Judge improperly exercised that discretion, I ought not to interfere. As the learned Chief Justice has said, we are not concerned with the question whether if a valuable building had been erected upon the land and there had been a delay on the part of the plaintiff to come into Court and assert his rights, it might not have been within the competence of the Judge to withhold the relief granted. But upon the facts as found by the learned Judge, I cannot say that he has exercised a wrong discretion in granting the injunction, and I therefore dismiss the appeal with costs.

BRODHURST, J.—I concur with the learned Chief Justice.

TYRRELL, J.—I concur with the learned Chief Justice and in the order that he has passed in the case.

MAHMOOD, J.—I also concur in the order which has been made by the learned Chief Justice and my learned brethren. All I wish to add is, that, in reference to the rule laid down by me in *Paras Rám* v. *Sherjit* (1), the learned Judge upon the evidence before him recorded the following finding:

"I must find that the respondent Shadi has, by building the house, encroached on common land in excess of his share, and as this injury cannot be remedied by partition, the appellant-plaintiff is entitled to the relief claimed of having the house pulled down."

Now I take this to be a finding of fact, as the learned Chief Justice and my learned brethren have taken, rendering the principles upon which my ruling in *Paras Rám* v. *Sherjit* (1) proceeded inapplicable, and it is enough to say that, whilst still adhering to the

(1) I. L. R., 9 All., 661.

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principles to which I there gave expression, I think the reference need not have been made if the authority of the ruling had not been doubted, the reference being suggested by the circumstance that it was a ruling of myself sitting as a single Judge.

Appeal dismissed.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

SHEO PRASÂD (JUDGMENT-DEBTOR) *v.* HIRA LAL (DECREE-HOLDER).

Execution of decree—Death of judgment-debtor after attachment but before sale in execution—Subsequent sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code, ss. 234, 276, 311, 312.

S. 234 of the Civil Procedure Code applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life-time, and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force an attachment of property made in the judgment-debtor's lifetime. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damnified by the sale, his remedy is by application under s. 311 of the Code.

So *held* by the Full Bench, Mahmood, J., dissenting.

Where, subsequent to the attachment of immoveable property in execution of a simple money decree, the judgment-debtor died, and the property was then sold, without making the legal representatives of the judgment-debtor parties to the sale proceedings,—*held* by the Full Bench (Mahmood, J., dissenting) that the sale was regular and valid notwithstanding such omission. *Ramasami Ayyangar* v. *Bagirathi Ammal* (1) dissented from.

Held by Mahmood, J., that on the principle of *audi alteram partem*, and because the rules provided by the Civil Procedure Code for suits should, under s. 647, be applied to execution proceedings (those proceedings including and terminating in the sale), the omission to make the legal representatives of the judgment-debtor parties to the sale proceedings was an irregularity; but that such irregularity would not invalidate the sale without proof of substantial injury within the meaning of s. 311;

(1) I. L. R., 6 Mad. 180.

and that as in the present case no such substantial injury was either alleged or proved, the sale was valid.

Held also by Mahmood, J., that a person claiming by title paramount to or independent of the judgment-debtor is within the meaning of s. 311 of the Code. *Asmutunnissa Begum* v. *Ashruff Ali* (1) dissented from. *Abdul Huq Mozoomdar* v. *Mohini Mohun Shaha* (2) followed.

The facts of this case are stated in the judgments of Edge, C. J., and Mahmood, J.

Mr. *Dwarka Nath Banerji*, for the appellant.

Munshi *Kashi Prasád*, for the respondent.

EDGE, C. J.—In execution of a decree, which, so far as this case is concerned, was one for money against Bhim Sen and Dal Chand, a *bagh* of 16 biswas in mauza Lashkarpur was put up for sale by auction on the 3rd September 1880, and was at that sale purchased by one Bhabuti. That sale was confirmed on the 19th November 1880, and Bhabuti obtained possession of the *bagh*. He also obtained a sale-certificate. By a sale-deed dated the 20th July 1881, Bhabuti conveyed the *bagh* to Pandit Hira Lál, the plaintiff in this suit. In July 1884, the defendant without any authority from the plaintiff entered upon the *bagh*, and cut down and removed some of the trees. In respect of that alleged wrongful entry and the alleged wrongful cutting down and removal of the trees by the defendant, the plaintiff brought the suit out of which this second appeal has arisen.

The defendant raised several defences, one of which only we need consider, the findings of facts having disposed of the others adversely to him.

The question which we have to consider arises on the defendant's plea that Dal Chand had died before the sale, and that the defendant as the representative of Dal Chand was not made a party to the proceedings in execution of the decree under which the *bagh* was sold.

It has been found as a fact by the lower appellate Court that Dal Chand died before the sale, but that beyond that fact there is

(1) I. L. R., 15 Calc. 488. (2) I. L. R., 14 Calc. 240.

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no reliable evidence to show when he died. It is admitted that the defendant was not made a party to the proceedings in execution.

On behalf of the defendant, who is the appellant before us, Mr. *Banerji* contended that the omission to make the defendant as the representative of Dal Chand a party to the proceedings in execution rendered the sale, so far as the interest which was of Dal Chand in his lifetime, a nullity, and that it was for the plaintiff to prove his title and establish a good and valid sale to Bhabuti, his vendor, by showing that Dal Chand was alive not only at the dates of the sale and confirmation of sale, but at the date of the decree. Mr. *Banerji* in the course of his argument relied on the cases of *Ramasami Ayyangar* v. *Bagirathi Ammal* (1), *Asmutunnissa Begum* v. *Ashruf Ali* (2), *Jasoda* v. *Mathura Das* (3), *Rán Chand* v. *Pitam Mal* (4), *Ganga Prasád* v. *Jag Lal Rái* (5), *Imam-un-nissa Bibi* v. *Liakat Husain* (6), *Dulari* v. *Mohan Singh* (7), and *Bakhshi Nándkishore* v. *Malak Chand* (8). Mr. *Kashi Prasad* for the plaintiff relied upon the cases of *Stowell* v. *Ajudhia Nath* (9) and *Gulab Das* v. *Lakshman Narhar* (10).

The question as to the onus of proving the date of Dal Chand's death may be easily disposed of. At the date of the alleged trespass in July 1884 the plaintiff was in possession, and between that date and 1880 he or his vendor Bhabuti had been in possession of the *bagh*. That possessory title was a sufficiently good one to enable the plaintiff to maintain his suit until the defendant proved a better title. Further, the certificate of sale afforded *primâ facie* evidence as against the defendant, claiming as the representative of Dal Chand, of a good title in Bhabuti from whom the plaintiff derived title. Again, the defendant had not pleaded that Dal Chand had died before the decree. If it had been open to the defendant on the pleadings (in my judgment it was not) to prove that Dal Chand had died before the date of the decree, it was for him to prove it, and thus to rebut the inference that the decree was properly

(1) I. L. R., 6 Mad. 180.
(2) I. L. R., 15 Calc. 488.
(3) I. L. R., 9 All. 511.
(4) I. L. R., 10 All. 506.
(5) I. L. R., 11 All. 333.
(6) I. L. R. 3 All. 424.
(7) I. L. R., 3 All. 759.
(8) I. L. R., 7 All. 289.
(9) I. L. R., 6 All. 255.
(10) I. L. R., 3 Bom. 221.

and lawfully made. In my opinion, if the question had been open to the defendant, the onus of proving that Dal Chand had died before the date of the decree was upon him.

The other question, namely, what effect, if any, had the omission to make the defendant as the representative of Dal Chand a party to the execution proceedings, is a more difficult one, and that I now propose to consider. We must take it, as the contrary has not been pleaded or proved, that the attachment took place and the order of sale was made in the lifetime of Dal Chand, and that they were duly made.

Many of the authorities which have been cited appear to me to have little or no bearing upon the point which we have to consider here. The case of *Rám Chand* v. *Pitam Mal* (1) is merely an authority showing that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money. In the case of *Imam-un-nissa Bibi* v. *Liakat Husain* (2) the judgment-creditor in execution of a decree for money and without making the representative of the deceased judgment-debtor a party, took out, after the death of the judgment-debtor, attachment of certain immoveable property which had been of the deceased judgment-debtor and was then in the possession of his representative. The cases of *Bakhshi Nand Kishore* v. *Malak Chand* (3) and *Ganga Prasád* v. *Jag Lál Rai* (4) turned on the construction of ss. 290 and 311 of the Code of Civil Procedure, whilst that of *Jasoda* v. *Mathura Das* (5) turned on the construction of ss. 287, 290 and 311 of that Code.

In *Asmul-un-nissa Begam* v. *Ashruff Ali* (6) the question was whether a person who claimed to be a purchaser from a judgment-debtor prior to an attachment was entitled to come in under s. 311 of the Code of Civil Procedure and object to the sale of the judgment-debtor's property.

Of the cases more directly in point, that of *Stowell* v. *Ajudhia Nath* (7) decided that a sale in execution of a decree is not rendered

(1) I. L. R., 10 All. 506.
(2) I. L. R, 3 All. 424.
(3) I. L. R., 7 All. 289.
(4) I. L. R., 11 All. 33.
(5) I. L. R., 9 All. 511.
(6) I. L. R., 15 Calc. 488.
(7) I. L. R, 6 All. 255.

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invalid by reason of the judgment-debtor having died before the sale and no representative of his having been made a party to the execution proceedings.

In *Gulab Das* v. *Lakshman Narhar* (1), the Bombay High Court held that Act X of 1877 did not provide that applications for execution should, like suits, abate by the death of the judgment-creditor. In *Dulari* v. *Mohan Singh* (2) the majority of the Court held that a sale was not invalid by reason of its having taken place after the death of the decree-holder and without his representative having been brought into the execution proceedings. The only authority to which we have been referred or of which I am aware for holding that a sale in execution of a decree, after attachment in the lifetime of the judgment-debtor, could not legally be had after the death of the judgment-debtor, unless his representative was brought into the execution proceedings, is that of *Ramasami Ayyangar* v. *Bagirathi Ammal* (3). In that case the learned Judges of the Madras High Court did not give their reasons for their opinion, but I infer that they thought, but why I do not know, that s. 234 of the Code of Civil Procedure applied in that case. S. 234 of the Code of Civil Procedure applies in my opinion only to cases in which, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment at the suit of the judgment-creditor. That section contemplates that property which was of the judgment-debtor in his lifetime may not only have come to the hands of his legal representative, but may before the making of the application under the section have been duly disposed of by the representative, and indicates that in respect of property so duly disposed of the legal representative would not be liable. That section also provides a means by which the liability of the representative may be ascertained.

How, having regard to the provisions of s. 276 of the Code of Civil Procedure, the representative could, as against the judgment-creditor, duly dispose of property which was under attachment at

(1) I. L. R., 3 Bom. 221. (2) I. L. R., 3 All. 759.
(3) I. L. R., 6 Mad. 180.

the suit of the judgment-creditor, I fail to see. Nor do I see what necessity there could be for providing in s. 234 a means by which to ascertain the liability of the representative in respect of property under attachment at the suit of the judgment-creditor.

I can find nothing in the Code of Civil Procedure to warrant the suggestion that an attachment would abate on the death of the judgment-debtor, or that his death would render it necessary for the judgment-creditor to take any steps to keep in force an attachment of property made in the lifetime of the judgment-debtor.

After a careful examination of the sections in the Code of Civil Procedure relating to attachment, I am of opinion that property under attachment must be considered as in the custody of the law.

West, J., in delivering the judgment of the Court in *Gulab Das* v. *Lakshman Narhar* (1), at p. 222, pointed out, I think correctly, the distinction which exists between pending suits and pending proceedings in execution. In the one case the rights of the plaintiff against the defendant have to be ascertained. In the other case and before execution of the decree is had, these rights have been already ascertained, and it only remains to enforce the decreed rights by execution. If the judgment-debtor's property is under attachment the execution of the decree can proceed against such property, but if at the time of the death of the judgment-debtor his property is not under attachment, the judgment-creditor must, except in the case of a decree under s. 89 of the Transfer of Property Act, proceed under s. 234, if he desires to execute his decree against property which was of the judgment-debtor in his lifetime and which came into the hands of his legal representative at his death, or if he desires to make the legal representative personally liable by showing that property which was of the judgment-debtor came to the hands of the legal representative and was disposed of by him otherwise than "duly" within the meaning of that section. Under s. 275 any person interested in property under attachment may, in the case contemplated by that section, apply for the withdrawal of the attachment.

(1) I. L. R., 3 Bom. 221.

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S. 280 provides for the releasing of property under attachment on the allowance of a claim or objection. S. 284 empowers a Court to order a sale of property under attachment. I do not find in the Code of Civil Procedure any provision requiring notice to be given personally to a jugdment-debtor or his legal representative of a sale of property under attachment.

S. 311 enables "any person whose immoveable property has been sold under" chapter XIX to apply in the cases therein specified to set aside the sale. It is difficult to see how the legal representative, as such, of a deceased judgment-debtor could be dampified by a sale of property attached and ordered to be sold in the lifetime of the judgment-debtor, except in one of the events provided for by s 311. I can find no section in the Code which provides that the legal representative, any more than a stranger whose property is sold, is to get notice of the sale of property under attachment, except as one of the public by the proclamation of the sale which is required under the Code.

The defendant here has shown no case on the merits; his defence so far as it is not met by the findings of fact, is a purely technical defence at the best, and in my opinion he is not entitled to succeed on that defence.

To hold otherwise would be to impose upon the purchaser at an execution-sale under a decree, the necessity of ascertaining before he paid the purchase-money whether the judgment-debtor was alive at the actual moment when the sale took place, or the risk of losing the purchase-money which he paid and the property in respect of the purchase of which that money was paid, and would in any event render it difficult for such a purchaser to maintain his title under his sale-certificate if subsequently challenged by the legal representative of the deceased judgment-debtor, the exact date of whose death it might be impossible for the purchaser to ascertain or prove.

I may say further that I am of opinion that there would have been no necessity for any attachment in this case if the sale, as we at first assumed it was, had been under a decree under s. 89 of the Transfer of Property Act directing the sale of the property in ques-

tion in enforcement of a mortgage specfically affecting it. I may say that this is the view which was expressed by my brother Straight in *Stowell* v. *Ajudhia Nath* (1).

When under a decree under s. 89 of the Transfer of Property Act, property of a person other than the judgment-debtor is sold, such other person has his remedy by suit.

I would dismiss this appeal with costs.

STRAIGHT, J.—I concur.

BRODHURST, J.—I concur.

TYRRELL, J.—I concur.

MAHMOOD, J.—I understand the facts of this case to be the following :—

On the 13th June 1876, Bhim Sen and Dal Chand executed a hypothecation bond in favour of one Mr. C. W. Stowell, who sued them for the money due on the bond and obtained a decree against both of them jointly on the 3rd December 1879. The decree was partly a decree enforcing hypothecatory lien against certain properties mentioned therein, and it was partly a simple money-decree against the judgment-debtors personally, and it has been expressly conceded by Mr. *Kashi Prasád* on behalf of the plaintiff-respondent that the decree awards no enforcement of hypothecation against the property now in suit, namely, *bagh* No. 911.

For the purposes of this case therefore that decree must be dealt with as a *simple money-decree*.

The decree was put into execution on the 6th May 1880, and it is admitted that in the course of execution proceedings the property now in suit was attached and notified for sale by auction, which took place on the 3rd September 1880, at which one Bhabuti Singh purchased the rights and interests of the judgment-debtors in the property now in suit.

The Court executing the decree confirmed the sale on the 19th November 1880, and granted a sale-certificate to the aforesaid Bhabuti Singh on the 19th March 1881.

(1) I. L. R., 6 All. 255.

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On the 20th July 1881, the present plaintiff-respondent, Hira Lál, purchased by private sale from Bhabuti Singh the rights and interests which the latter had acquired under the auction-sale of 3rd September 1880, to which the sale-certificate of 19th March 1881 related.

The present litgation began in a suit instituted by the plaintiff-respondent on the 20th July 1885, in which he alleged that the property now in suit belonged exclusively to Bhim Sen and Dal Chand, the judgment-debtors of 3rd December 1879; that their rights were duly purchased by the aforesaid Bhabuti Singh in the auction-sale of 3rd September 1880, to which the sale-certificate of 19th March 1881 related; that those rights were duly purchased from him by the plaintiff under the sale-deed of 20th July 1881; that under such purchase the plaintiff acquired proprietary possession of the property in suit; that in the month of July 1884 the defendants Bhim Sen and Sheo Prasád forcibly arrested him from the *bagh* and felled certain trees of the *bagh* of the value of Rs. 124, and appropriated them.

Upon these allegations the plaintiff prayed for a decree awarding him possession of the property in suit and recovery of Rs. 124 damages as the value of the trees above-mentioned.

It is clear from the plaint that the suit was in the nature of an action for ejectment and recovery of money as damages in connection with the property in suit, and there is no question that such a suit is maintainable in our civil Courts.

The suit was resisted by the defendant Bhim Sen mainly upon the ground that the plaintiff had purchased only the rights and interests of him, Bhim Sen; that the other judgment-debtor Dal Chand had died before the auction-sale of the 3rd September 1880, and his heirs were not represented in the execution proceedings; and the defendant further pleaded that he had been unnecessarily impleaded in the suit as he had not felled or appropriated any of the trees to which the suit related. The other defendant, Sheo Prasád, appellant before us, pleaded that the plaintiff's purchase was limited to the rights and interests of Bhim Sen and Dal Chand,

and could not entitle him to claim any further rights; that three years before the suit the trees in question had been felled and appropriated by the plaintiff's vendor Bhabuti Singh; that at the time when the auction-sale of 3rd September 1880 took place the judgment-debtor Dal Chand had already died and his heirs were not represented in the execution proceedings; that therefore the auction purchase by the plaintiff's vendor Bhabuti Singh was null and void, and could confer no title upon the plaintiff to maintain such an action.

There were also other pleas in defence, of which the only one which I need refer to was a plea to the effect that the *bagh* in dispute was ancestral property belonging to a common ancestor, Bija Rám, and that the shares of Bhim Sen and Dal Chand were limited to two-fifths of the property, and the plaintiff therefore had no title to claim the whole of it.

Upon this state of the pleadings, the Court of first instance framed no less than seven issues, and, in a judgment which I cannot regard as adequate or satisfactory, decreed the whole suit on the 22nd September 1885.

From that decree only the defendant Sheo Prasád appealed to the lower appellate Court on the 9th November 1885, and the appeal was dismissed by that Court on the 15th February 1886, in which the learned Judge of that Court held, with reference to the evidence before him, that the *bagh* in question was exclusively owned by Dal Chand and Bhim Sen, who were for years separate from their brothers and nephews; and that the plaintiff's title therefore extended to the whole property in suit under the sale-certificate of 19th March 1881, notwithstanding the circumstance that at the time of the auction-sale of 3rd September 1880, to which that certificate related, Dal Chand was not alive and his heirs were not represented in the execution proceedings. In holding this view the learned Judge relied upon the ruling of this Court in *Stowell* v. *Ajudhia Nath*, (1), interpreting that ruling to lay down that the antecedent death of a judgment-debtor does not render the sale of his

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property void. From the decree of the lower appellate Court this second appeal has been preferred, and it came on for hearing before my brother Brodhurst and myself, and we by our order of the 23rd May 1887 remanded the case to the lower appellate Court for ascertaining whether Dal Chand died before or during the pendency of the execution proceedings which resulted in the sale of the 3rd September 1880, and the confirmation thereof on the 19th November 1880, also whether during such proceedings any person was acting as the legal representative of the deceased Dal Chand.

Upon remand the learned Judge of the lower appellate Court has found (to use his own words) that "Dal Chand died some time before the sale, but whether that death took place before or after the execution proceedings were taken against him, the Court has no materials before it to found its opinion upon."

With this finding the case came on before my brother Brodhurst and myself again, and by our order of the 10th January 1888, and in view of the rulings which were then cited to us, we directed that the case be laid before the learned Chief Justice, with a recommendation that the same may be heard by the whole Court, and it is in pursuance of his order of the 16th January 1888 that the case has been heard by a Bench consisting of the whole Court.

Now, upon this state of things, Mr. *Dwarka Nath Banerji*, on behalf of the defendant-appellant, Sheo Prasad, has argued, and I think soundly, that, inasmuch as the action is in ejectment and for damages for an alleged trespass, the plaintiff-respondent was bound to show a good title to maintain such an action; and that since the solitary title alleged by him rested upon the auction-sale of the 3rd September 1880, which was confirmed on the 19th November 1880, and to which the sale-certificate of 19th March 1881 related, that certificate represented what the learned counsel called a "parliamentary title," and would for its validity depend upon proof that the statutory requirements for conveyance of such a title had been duly observed before the title-deed, namely, the sale-certificate of 19th March 1881, had been granted to the plaintiff. I think the learned counsel was also right when he contended

that the validity of that title-deed depended upon the validity of the auction-sale of the 3rd September 1880, and that such a question was to be decided with reference to the rules contained in the Code of Civil Procedure and with especial reference to auction-sales in execution of simple money-decrees.

This argument has been met by Mr. *Kashi Prasad* on behalf of the plaintiff-respondent upon grounds other than those which would repudiate the principles upon which Mr. *Banerji's* argument for the defendant-appellant proceeded. The learned pleader has argued that although the rules of the Code of Civil Procedure would govern the validity of his client's title under the auction-sale of 3rd September 1880, yet those rules in themselves would justify our holding, as the lower appellate Court has held, that the plaintiff had a good title to maintain the action. Now, what really has to be considered in the case are two important questions of law :—

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First,—Whether, when a sale in execution of a simple money-decree takes place of property which belonged to a judgment-debtor of such a simple money-decree, at a time when he was not alive and his legal repesentatives were not brought upon the record of the execution proceedings resulting in such sale, the sale is *ipso facto* null and void so as to convey no title to the purchaser at such sale.

Secondly,—Whether, when such a sale has actually taken place and the purchaser at such sale seeks to acquire the benefits of his purchase in an action such as this, he can be defeated upon the mere plea that, in consequence of the judgment-debtor whose rights he purchased being dead at the time of the sale, he has purchased nothing because the sale is null and void.

Before I proceed to consider the first of these questions, I think it is necessary to say that, upon the findings of the lower appellate Court on remand, and in view of the evidential presumption of law amply recognized by our own law in ss. 107 and 108 of the Evidence Act (I of 1872), as to the continuity of human life, I may take it, in the absence of evidence to the contrary, that on the 16th

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May 1880, when the attachment of the property took place and on the 22nd July 1880, when the proclamation of sale was issued, the judgment-debtor Dal Chand was still alive. And before I go any further I wish to say that this finding relieves me of having to consider how far I am still prepared to abide by the Full Bench ruling of this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (1) to which I myself was a party and in which it was held that a regulary perfected attachment is an essential preliminary to sales in execution of simple money-decrees, and that where there has been no such attachment any sale that may have taken place is not simply voidable but *de facto* void. In this case, I take it that the deceased Dal Chand was alive when the attachment was duly made, and when in consequence of such attachment the property was proclaimed for sale. All that I take to have been found by the lower appellate Court is that he was dead at the time when the auction-sale of 3rd September 1880 took place, and to this circumstance alone I shall refer in dealing with the first point, as indeed also in dealing with the next.

Now, the only ruling of importance which has been cited on behalf of the defendant-appellant on this part of the case is *Ramasami Ayyangar* v. *Bagiratki Ammal* (2), where Innes and Kindersley JJ., concurred in holding that where a judgment-debtor died after his land had been attached, and the creditor brought the land to sale without making the representatives of the deceased parties to the proceedings, the sale was illegal and must be set aside, apparently as the report suggests, without any investigation as to whether such sale had caused any "substantial injury" within the meaning of s. 311 of the Code of Civil Procedure. As a counterpoise to this ruling, a judgment of the Bombay High Court in *Gulab Das* v. *Lakshman Narhar* (3) has been cited to maintain the proposition that "the Code of Civil Procedure does not provide that applications for execution shall, like suits, abate by the death of the judgment-creditor"; but to neither of these extreme views can I find it possible to give my consent.

(1) I. L. R., 5 All., 86. (2) I. L. R., 6 Mad. 180.
(3) I. L. R., 3 Bom. 221.

What I have to consider is whether the mere circumstance of the judgment-debtor Dal Chand being dead on the 3rd September 1880, when his rights were sold to Bhabuti Singh, from whom the plaintiff derives his title, renders the sale null and void for purposes of conveying title.

To this question my answer is in the negative, and the best way in which I can explain my views is to pass on to the second point as enunciated by me in this judgment. I hold, as I have long held, that the provisions of the Civil Procedure Code as to the array of parties are applicable, not only to original suits in the Court of first instance, but also applicable *mutatis mutandis* to appeals and miscellaneous proceedings in the civil Courts, such as s. 647 of the Code contemplates, including, of course, proceedings in execution of a decree. But it is one thing to say that those rules as to the array of parties in execution proceedings are applicable to them, and it is a totally different thing to say that where those rules have not been duly observed, and in execution of a decree an actual attachment has duly taken place, and proclamation of sale duly issued in the lifetime of the judgment-debtor (as in this case) the auction-sale is null and void, because at the date of the sale the auction-purchaser purchased the rights of one who at that date was not alive, and whose representatives had not been brought upon the record as representing the deceased.

In *Lekraj Roy* v. *Becharam Misser* (1) the High Court of Calcutta laid down the rule that execution cannot issue against the estate of a deceased person if there is no one on the record as representing the estate, and I think the rule so laid down was not only sound under the old Code, which governed that case, but it also sound under the present Code of Civil Procedure; because the rule of law, notwithstanding recent legislation, still stands firm that *audi alteram partem*, and no judicial process requiring the hearing of both parties could therefore be issued without the chance being given to the opposite party to say what he has to say against any proposed judicial process when (and this is important) the law

(1) 7 W. R., 52.

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requires that he should have such a chance. There are of course numerous provisions in the Code of Civil Procedure which contemplate the existence of the judgment-debtor, enabling him to raise objections in the course of execution proceedings or to take measures to satisfy the decree in order to save his property from being brought to sale. As illustrations of this I may refer to ss. 257 A, 258 and even to s. 291 of the Code, which all contemplate the existence of a living judgment-debtor during execution proceedings. Similarly, there are many provisions in the Code which contemplate that, when a judgment-debtor is dead, execution proceedings should be taken against his legal representative. Illustrations of this class of provisions are to be found in ss. 234, 248 (*b*), 249, and I think there was much cogency in what Mr. *Banerji* urged in his argument that clause (*c*) of s. 248 distinctly contemplates that the legal representative of a deceased judgment-debtor should be made a party to execution proceedings, and that the last paragraph of that section is in keeping with the argument, that when execution proceedings terminate in a sale and a certificate of sale is granted under s. 316, the title, not only of the original judgment-debtor, but also of his legal representatives passes to the purchaser, which could not be the case unless such legal representative was made a party to the execution proceedings. So far I accept Mr. *Banerji's* argument, and I go even further with him when he contended that objections to a sale with the object of setting it aside, such as those contemplated by ss. 311 and 312, are available to the legal representative of a deceased judgment-debtor as much as to the original judgment-debtor himself; because when a sale-certificate is granted under s. 316 after confirmation of the sale, the law in that section prescribes that "so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before." But I do not think that the views which I have thus expressed overcome Mr. *Bannerji's* real difficulty in supporting the case of his client Sheo Prasád, defendant-appellant. His position in the litigation has already been described by me, as also the main outlines of the defence which he set up, showing as it does that the

position taken up by him was not that of being the legal representative of the deceased judgment-debtor Dal Chand, but rested mainly upon the assertion of a paramount or independent title, and also upon the technical plea as to defect in the plaintiff's title, by reason of Dal Chand being dead when the auction-sale in execution of decree took place on the 3rd September 1880.

Now, so far as the plea as to paramount or independent title is concerned, the finding of fact by the lower appellate Court is conclusive in second appeal, that no such title existed in Sheo Prasád at the date of the sale, for the judgment-debtors, Bhim Sen and Dal Chand, were exclusive owners of the property then sold. This being so, all that is left to Mr. *Banerji* is the technical defect in the plaintiff's title which the defendant-appellant seeks to find, by reason of what has been addressed on his behalf under the provisions of the Civil Procedure Code, as to the title conveyed under s. 316 by a sale-certificate.

In the case of *Ramchhaibar Misr* v. *Bechu Bhagat* (1), I dwelt at some length upon the various divisions of the Civil Procedure Code as to execution of decrees, with especial reference to the scope of ss. 311 and 312 in their connection with s. 244 of the Code. I said—"I take it, that when execution of a decree is prayed for by a decree-holder, all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution, &c., of the decree, may be disposed of under s. 244. There may be questions relating to the validity of attachment, the mode of execution, &c., but when one and all of these matters do terminate in sale, I maintain that all that is comprehended within the definition of execution comes to an end there, because the purchaser comes as a third party, and is not bound by s. 244 as to proceedings antecedent to sale. The 'execution,' so far as s. 241 is concerned, is over, and the questions that may arise *after* the *sale* are no more, strictly speaking, questions relating to the execution, discharge or satisfaction of the decree within the meaning of cl. (*c*) of s. 244. As soon as there is a sale, the execution of the decree, so far as the

(1) I. L. R., 7 All., 641.

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decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree."

I had again to consider a cognate question in *Rám Chand* v. *Pitam Mal* (1), where, in deference to the Full Bench ruling of this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (2), I held, with my brother Brodhurst's concurrence, that absence of a valid attachment in execution of a simple money-decree was a matter which might be complained of under s. 311 of the Code for purposes of setting aside a sale, *without proof* of substantial injury, since the Full Bench judgment declared such sales to be absolutely *void*.

In this case, however, as I have already said, no question as to the absence of a valid attachment at the time of the sale arises, and the question is limited to what the defendant-appellant might have done subsequent to the sale of 3rd September 1880, if he had been either impleaded as the legal representative of the deceased judgment-debtor Dal Chand, or had taken up the position of a paramount and independent title, as he has done in his defence in this case.

Now, as I understand Mr. *Banerji's* argument, I took his contention to be that the defendant-appellant, having never been brought upon the record as the legal representative of the deceased Dal Chand, could raise no objections under s. 311 to set aside the sale of 3rd September 1880, and that, as claiming under title paramount to or independent of the deceased Dal Chand, he could not avail himself of the provisions of that section. For the latter part of this contention the learned counsel relied upon a recent Full Bench ruling of the Calcutta High Court in *Asmutunnisa Begum* v. *Ashruf Ali* (3), where the learned Judges concurred, by overruling a Division Bench ruling of their Court in *Abdul Huq Mozoomdar* v. *Mohini Mohun Shaha* (4), in holding "that a person claiming by title paramount to the judgment-debtor is not within the meaning of the words '*any person*' in the section, inasmuch as his title to the pro-

(1) I. L. R., 10 All., 503.
(2) I. L. R., 5 All., 86.
(3) I. L. R., 15 Calc., 488.
(4) I. L. R., 14 Calc., 210.

perty is not affected by the sale, whether it were regular or irregular, and therefore cannot apply to the Court to set aside the sale."

In adopting this rule the learned Judges purport to have approved and followed a judgment of Westropp, C. J., in *Krishnarav Venkatesh* v. *Vasudev Anant* (1); but I respectfully think that the principle of that ruling, though it interpreted the old Code of 1859, was opposed to the rule laid down by the Full Bench of the Calcutta High Court, the effect of which I understand to be that the words "*any person*" as they occur in s. 311 do not include persons who may seek to set aside a sale under a title independent of the judgment-debtor, even if they can show that they have sustained substantial injury by the sale within the meaning of that section. With all respect due to the Full Bench ruling of the Calcutta High Court, I find myself unable to accept the conclusion at which their Bench arrived; because I think it is seldom safe, and always risky, to credit the Legislature with notions that it does not clearly express in a statute, and it is even more disastrous, as a matter of interpretation, to limit words of broad and general import when the statute itself provides no such limitations. I confess, therefore, that the rule laid down in *Abdul Haq Mozoomdar* v. *Mohini Mohun Shaha* (2) which was overruled by the Full Bench of the Calcutta Court, is the rule which I adopt in interpreting s. 311 of the Code in this case. And in this view Mr. *Banerji's* contention that his client could not after the sale of 3rd September 1880, avail himself of ss. 311 and 312 of the Code of Civil Procedure if he wished to set aside the sale, fails. I do not say that his omission to do so debarred him from raising the defence which he has raised in this suit. But what I do maintain is, that, he having failed in this case to prove any title in him paramount to the title of the deceased judgment-debtor Dal Chand, whose rights and interests were sold in the auction-sale of 3rd September 1880, he having been found to be the owner of the property in suit, the defendant-appellant cannot succeed in resisting the suit by dint of proving technical irregularities in the sale without proving substantial injury to him-

(1) 11. Bom. H. C. Rep, 15. (2) I. L. R., 14 Calc., 240.

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self within the meaning of s. 311, such as would vitiate the plaintiff-respondent's title, namely, the certificate of sale which his predecessor in interest obtained under s. 316 of the Code conveying to him the rights of the deceased Dal Chand.

Now, upon this question as to what irregularities in an execution sale would justify its being set aside under ss. 311 and 312 of the Code, there is not, I am afraid, full accord in the *ratio decidendi* of the various rulings of this Court, and, so far as I am concerned in them, they were amply considered by my brother Brodhurst in *Ganga Prasád* v. *Jag Lál Rai* (1), where he dissented from the learned Chief Justice upon a question which does not arise in this case, and which I need not therefore consider any further, beyond saying that the difference of opinion in that case related to the exact effect to be given to s. 290 of the Code so far as it prohibits sales within thirty days of the proclamation.

We are not in this case concerned with any imperative or prohibitory provisions of the Code as to execution sales, and I think that Mr. *Banerji's* argument proceeded upon inferences to be derived from the statute rather than upon any express provisions which, even according to his contention, would vitiate the auction-sale of 3rd September 1880, by the mere circumstance of the judgment-debtor Dal Chand not being alive at the time of the sale. I have already pointed out that he must be taken to have been alive at the date of the attachment and proclamation for sale, and that those proceedings must therefore be presumed to have been duly taken by the Court executing the decree. I have also said enough to show that the heirs of Dal Chand should have been brought upon the record, also that the defendant-appellant, though a third party according to his case, might have appeared on the scene to set aside the sale under ss. 311 and 312 of the Code. But the fact remains that he did not do so, and though as I have already said, he is not debarred from raising his present defence to the action any more than he would have been from other remedies, such as objecting to attachment under s. 278 or maintaining a suit under s. 283 or s. 335

(1) I. L. R., 11 All., 333.

of the Code, we have to consider whether in the absence of any title in himself independent of the deceased Dal Chand, he has sustained any substantial injury such as would have induced the Court if he had objected under s. 311 to set aside the sale, or should induce us now in this regular action to vitiate the sale, for the solitary reason that at the date of the sale the judgment-debtor Dal Chand was not alive.

It seems to me that the omission to bring upon the record the legal representative of the deceased Dal Chand was a mere irregularity which could not *per se* vitiate the sale without proof of substantial injury within the meaning of s. 311 of the Code. In *Jasoda* v. *Mathura Das* (1) I suggested a doubt whether what might be called a "material irregularity" within the meaning of s. 311 would not by itself vitiate a sale without proof of substantial injury, and in *Rám Chand* v. *Pitam Mal* (2) I doubted my own suggestion in the earlier case, and I think I may say that the latter case was governed entirely by the Full Bench ruling in *Mahadeo Dubey* v. *Bhola Nath Dichit* (3), as my remarks at page 517 of the report show.

What I hold now, however, is that, for purposes of setting aside a sale under s. 311, the irregularity, whether material or simpler irregularity, is not sufficient unless "substantial injury by reason of such irregularity" is proved. I think this is the effect of much of what was said by the Lords of the Privy Council in *Girdhari Singh* v. *Hurdeo Narain Singh* (4), and in *Olpherts* v. *Mahabir Parshád Singh* (5), and I think the law now may be taken to be settled by the latest ruling of their Lordships on the subject in the case of *Arunachellam Chetti* v. *Arunachellam Chetti* (6).

The principles upon which these rulings proceed leave no doubt in my mind that even if the defendant-appellant had been impleaded as the legal representative of the deceased Dal Chand, or had come in as a third party to set aside the sale under ss. 311 and 312, he

(1) I. L. R., 9 All., 511.
(2) I. L. R., 10 All., 506.
(3) I. L. R., 5 All., 86.
(4) L. R., 5 I. A., 230.
(5) L. R., 10 I. A., 25.
(6) L. R., 15 I. A., 171.

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could not have succeeded without proof of substantial injury, and indeed Dal Chand himself if he had been alive and made such objections after the sale of 3rd September 1880, he too could not succeed in setting aside the sale without proving such injury. In the present case there is no allegation of such substantial injury as would require the setting aside of the sale, and the defendant-appellant naturally could not proffer such a plea consistently with the rest of his defence as to his title being independent of Dal Chand,—a plea which has been found against him by the lower appellate Court upon the evidence.

This being so, I fail to see what the defendant-appellant has to complain of. He is not the owner of the property which the plaintiff's predecessor in title purchased on the 3rd September 1880, in a sale which could not, in the absence of substantial injury be set aside at the instance of Dal Chand himself or of his legal representatives, much less at the instance of a third party like the defendant-appellant who claims a title independent of Dal Chand. For the reasons which I have stated, I hold that, though the sale of 3rd September 1880 was irregular by reason of the legal representative of the deceased judgment-debtor Dal Chand not being brought upon the record, notwithstanding his death subsequent to the attachment and proclamation for sale, the irregularity not having been proved to have caused any substantial injury within the meaning of s. 311 of the Code of Civil Procedure to the defendant-appellant or to any one else, the sale was not vitiated, and conveyed validly to the plaintiff's predecessor in title, Bhabuti Singh, the purchaser at that sale, all the rights and interests which the deceased Dal Chand possessed, and that therefore the suit was rightly decreed by the Courts below.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Young.

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BECHI (PLAINTIFF) *v.* AHSAN-ULLAH KHAN AND OTHERS (DEFENDANTS).

Civil Procedure Code, ss. 542, 587—*Court competent to raise question of limitation not raised by the parties—Act XV of* 1877 (*Limitation Act*) *ss.* 4, 5 *and* 12, *sch. ii, art.* 152—*Time requisite for obtaining a copy of a decree—Exclusion of time between delivery of judgment and signing of decree—Exclusion of time between furnishing of estimate of cost of copy and compliance with the estimate.*

Judgment was pronounced by the Court of first instance on the 23rd May 1887. The decree was signed on the 31st May. An application for copies was made by the defendants on the same day. Information of the estimate of the cost of copies was given to them on the 1st June; but they did not comply with that estimate until the 9th June. The copies were delivered on the 11th June. On the 30th June, the defendants filed their memorandum of appeal in the lower appellate Court which, on an office report that it was within time, admitted it, and fixed the 19th August for the hearing. On the 1st August, another office report was submitted, which showed that the appeal was beyond time. Accordingly the Judge on the 2nd August, directed the defendants to be informed that their appeal was dismissed. On the 27th August, however, the defendants presented a petition to the Judge in consequence of which he readmitted the appeal, and, cancelling his order of the 2nd August, directed that the appeal should be heard.

Held that the appeal was barred by limitation under art. 152, sch. ii of the Limitation Act (XV of 1877).

A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause, within the meaning of s. 5 of the Limitation Act, for the appellant in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal.

S. 5 of the Limitation Act cannot be applied in making the computation of time provided for by s. 12, and does not become applicable until after such computation has been made. *Rái Coomar Roy* v. *Shaikh Mahomed Wais* (1) dissented from.

In computing the time to be excluded under s. 12 of the Limitation Act from a period of limitation, the "time requisite for obtaining a copy" does not begin until an application for copies has been made. If therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless, an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bani Madhub Mitter* v. *Matungini Dassi*, (2) dissented from.

(1) 7 W. R. 337. (2) I. L. R., 13 Calc., 101.

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Per Edge, C. J., Brodhurst and Young, JJ.—A Court in computing under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the office, after application made, in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who has applied for them.

Per Edge, C. J.—The only section in the Limitation Act which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act, is s. 5.

Per Mahmood J.—Where there is delay in compliance with the estimate which is unavoidable and due to causes beyond the control of the applicant, such delay may be included in "the time requisite for obtaining a copy. Whether or not such delay is unavoidable is a question of fact in each case.

Per Mahmood, J.—A bare mistake of law is not a "sufficient cause" within the meaning of s. 5 of the Limitation Act for extending the period of limitation. *Huro Chunder Roy* v. *Surnamoyi* (1) dissented from.

The facts of this case are fully stated in the judgment of Mahmood, J.

Mr. *Amiruddin* and Pandit *Sundar Lál*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Munshi *Rám Prasád*, for the respondents.

MAHMOOD, J.—This case has come up for hearing before a Full Bench by order of the learned Chief Justice and my brother Young, dated 8th May 1890, in which they express their doubts as to the accuracy of the ruling of this Court in *Fatima Begam* v. *Hansi* (2), and state the question which they have referred to be "whether the minor's appeal in the Court below was properly admitted."

The question so referred, taken with the manner in which it has been argued before the Full Bench, seems to relate entirely to the question whether the lower appellate Court acted rightly in admitting the appeal to its register, only some of the defendants-appellants before that Court being minors. In order to understand the question which has arisen, it is necessary to bear in mind the following dates. The Court of first instance decided the case on the 23rd May 1887, and the decree of that Court was signed by the Subordinate Judge on

(1) I. L. R., 13 Calc., 104. See *Krishna* v. *Chathappan*, I. L. R., 33 Mad., 269.

(2) I. L. R., 9 All., 244.

the 31st May 1887. On the same day the defendants applied for copies of the judgment and the decree, and on the next day, *i.e.*, the 1st June 1887, they were informed of the estimated cost. It was not, however, till the 9th June 1887 that they fulfilled the requirements of the estimate by paying in the costs of the copies applied for, and the copies were delivered to them on the 11th June 1887.

On the 30th June 1887 the memorandum of appeal was filed in the lower appellate Court, and the office report being that the appeal was within time, it was accordingly registered, fixing the 19th August 1887, as the date of the hearing, and notices appear to have been issued accordingly.

Meanwhile on the 1st August 1887, the office of the lower appellate Court reported to the Judge that the former report was erroneous, and that the appeal was one day beyond time, as May should have been counted as a month of 31 days. In consequence of this report, and apparently without the presence of either of the parties, the learned Judge of the lower appellate Court passed the following order on the 2nd August 1887 :—

"Let the appellant be informed that this appeal must be rejected, being beyond time."

No notice, however, appears to have been given to the appellants in the lower appellate Court, nor does it appear whether the appeal was called on for hearing, and the parties or any of them attended on the 19th August 1887, which had been originally fixed for the hearing of the appeal.

On the 27th August 1887, however, the defendants-appellants in the lower appellate Court filed a petition complaining of the order of rejection, dated the 2nd August 1887, and praying that, since that order was passed in their absence, it might be reconsidered and the appeal might be heard. The application was granted by the Judge's order of the same day, *i.e.*, 27th August 1887, which runs as follows :

"As my order of 2nd instant was to inform appellant, and he has not apparently been informed till this petition is presented, and

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now appears to show cause for the appeal not being rejected, the appeal will remain on register and come on for hearing in due course."

It does not appear under what rules of procedure the learned Judge acted in rejecting the appeal in the absence of the appellants on the 2nd August 1887; nor is it clear under what section of the Civil Procedure Code the order of 27th August 1887, directing that the appeal should be heard, was passed. The appeal, however, came on for hearing in usual course, and resulted in the lower appellate Court's judgment of the 14th February 1888, whereby the appeal was decreed and the decree of the first Court reversed by dismissing the plaintiff's suit *in toto*.

It is from this decree that this second appeal has been preferred, and although no ground in the memorandum of appeal has been taken in this behalf, Pandit *Sundar Lál* on behalf of the plaintiff-appellant before us, has, in addressing his argument upon the point referred to the Full Bench, contended that the lower appellate Court should have dismissed the appeal before it, as it was barred by limitation under art. 152 of the Limitation Act (XV of 1877), and the circumstances of the case did not furnish sufficient grounds for extending the period of limitation by applying the provisions of the second part of s. 5 of that enactment. This preliminary plea was allowed to be argued by the Division Bench which referred the case, and has also been heard by the Full Bench, not only under the power contained in s. 542 (read with s. 587 of the Civil Procedure Code) but also in view of the stringent requirements of s. 4 of the Limitation Act, which casts upon the Judges the duty of applying the rules of limitation even where they are not pleaded. There is therefore no force in the preliminary objection taken on behalf of the defendants-respondents, to the effect that we should not allow the plea taken on behalf of the appellant to be argued at this stage.

With reference to the facts and dates above mentioned, the arguments of the learned pleaders for the parties raise four main questions for decision.

Firstly.—Whether, under the rule of computation contained in the second paragraph of s. 12 of the Limitation Act (XV of 1877), the defendants, who were appellants in the lower appellate Court, were entitled to the exclusion of *(a)* the period intervening between the day on which the first Court's judgment was pronounced (*i.e.*, the 23rd May 1887), and the date when the decree was signed (the 31st May 1887); and *(b)* the period intervening between the date when the estimate of the costs of copying was intimated to them (*i.e.*, the 1st June 1887), and the day on which they actually paid in the copying charges and fees (*i.e.*, the 9th June 1887).

Secondly.—Whether the circumstance that some of the defendants-appellants in the lower appellate Court were minors brought the appeal within the period of limitation when it was filed in the lower appellate Court (*i.e.*, the 30th June 1887).

Thirdly.—Whether, assuming that the appeal was beyond limitation, the circumstances of the case rendered the appeal a fit one for extension of limitation under the second paragraph of s. 5 of the Limitation Act.

Fourthly.—Whether, with reference to the ruling of this Court in *Fatima Begam* v. *Hansi* (1) the learned Judge of the lower appellate Court having admitted the defendants' appeal and heard and determined it, we should at this stage interfere with his order of 27th August 1887.

I will deal with these various questions in the order in which I have stated them, but before doing so, I consider, in view of the manner in which the Full Bench ruling of this Court in *Parbati* v. *Bkolu* (2) and my ruling in the Single Bench in *Sheogobind* v. *Ablakhi* (3) were referred to and discussed, that some explanation is due from me. The former of these cases was an application under s. 592 of the Code of Civil Procedure for leave to appeal *in formâ pauperis* which was barred by limitation but had been by inadvertence admitted by me, provisionally, in the Single Bench,

(1) I. L. R., 9 All., 244. (2) I. L. R., 12 All., 79.
(3) I. L. R., 12 All, 105.

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as if it was an appeal and entitled to the benefit of s. 5 of the Limitation Act. After the case had been heard and partly dealt with by a Division Bench consisting of my brother Brodhurst and myself, when no plea of limitation was taken by the respondent, it finally came on for hearing before a Full Bench consisting of the learned Chief Justice, my brother Brodhurst and myself, under circumstances which are fully stated at the outset of the judgment which the learned Chief Justice delivered in the case. He pointed out for the first time that the case was not an appeal, but an application for leave to appeal *in formâ pauperis* for which art. 170 prescribed only a limitation of 30 days; that the second paragraph of s. 5 of the Limitation Act could not cover such applications for purposes of extending limitation; that the application being presented beyond the prescribed period was altogether barred by limitation. In the course of the arguments Mr. *Chaudhri*, on behalf of the applicant, relying upon the Full Bench ruling of the Calcutta High Court in *Bani Madhub Mitter* v. *Matungini Dassi* (1), contended that, under s. 12 of the Limitation Act, time during which the decree remained unsigned must also be excluded in computing the period of limitation. The learned Chief Justice dissented from that ruling, and gave expression to his views as to the meaning of the phrase "the time requisite for obtaining a copy of the decree" in the second paragraph of s. 12 of the Limitation Act. In delivering my judgment in that case I did not refer to the Full Bench ruling of the Calcutta Court because, according to my view of the facts and dates of the case, even if that ruling were to be adopted by excluding the period between the 29th March and the 1st April 1887, when the decree had remained unsigned, and even if the period between the 16th April 1887 and the 19th April 1887, during which the applicant, after intimation of the estimate to furnish the charges and fees for the copies, did not furnish them, were to be excluded, her omission to attend on the 23rd April 1887, which was fixed for delivery of the copies and her not obtaining them till the 25th April 1887, rendered her application beyond limitation under any computation, and it could not be admitted except

(1) I. L. R., 13 Calc., 104.

under s. 5 which, I held, in concurrence with the learned Chief Justice, was wholly inapplicable to the application. I referred to s. 12 of the Limitation Act only to indicate, as fortifying the conclusion at which the whole Bench had arrived as to the inapplicability of s. 5 to pauper appeals, that the distinction which the Limitation Act draws between such appeals and ordinary appeals was at least at first sight noticeable even in the penultimate paragraph of s. 12 of the Act as to the time allowed for obtaining copies of judgments as distinguished from decrees. But my silence as to the other points of the interpretation of that section must not be understood as in any sense indicating my dissent from the views which the learned Chief Justice had expressed upon them, and if, in the course of the argument in this case, I referred to the matter, it was with no object other than pointing out, what the head-note of the printed report indicates, that the ruling of the Full Bench as a whole was limited to holding that the application was barred by art. 170 of the Limitation Act, and that s. 5 of that enactment could not be applied to such applications, the judgments of my brother Brodhurst and myself being silent on the other points upon which the learned Chief Justice had expressed his views. It would be a total misapprehension, and it could not be that, in thus referring to the case, when Pandit *Ajudhia Nath* for the respondent discussed it, I had any intention to shake the authority of the Full Bench ruling, or to show anything less than the profound respect which is always due from the members of this Court to any exposition of the law by the learned Chief Justice. Far from this being possible, I am, as I shall presently show, going to adopt in deciding this case the views as to the interpretation of s. 12 of the Limitation Act, which the learned Chief Justice expressed in delivering his judgment in the Full Bench case, and I will also show that my ruling in the Single Bench case is not in conflict with those views as I understand them.

To begin with the first part of the first question as stated by me, namely, whether, under the second paragraph of s. 12 of the Limitation Act, the defendants, who were appellants in the lower

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appellate Court, were entitled to the exclusion of the period during which the decree of the first Court, from which they were appealing, remained unsigned, that is, whether limitation should be computed from the 23rd May 1887, when the judgment was pronounced, or from the 31st May 1887, when the decree was signed. There is no doubt that, if this period is to be excluded, the defendants' appeal to the lower appellate Court would be within the period of thirty days allowed by art. 152 of the Limitation Act, and otherwise it would be barred by limitation, unless the second part of the first question relating to the delay in supplying the copying charges is decided in their favour. In arguing the first part of the question, Pandit *Ajudhia Nath* contests the views expressed by the learned Chief Justice in *Parbati* v. *Bhola* (1), and in doing so he relies upon the Full Bench ruling of the Calcutta High Court in *Bani Madhub Mitter* v. *Matungini Dassi* (2), which was expressly dissented from by the learned Chief Justice here, and which laid down the broad rule that the period during which the decree appealed against remains unsigned is to be excluded from computation, even though the decree was signed before application for copy was made. Indeed, the rule as stated in the judgment of Petheram, C. J., goes the length of laying down that even in cases where the decree remains unsigned for a period beyond that allowed for appealing from that decree, the appellant, by a subsequent application for obtaining a copy and procuring it, might prefer an appeal by excluding the whole period during which the decree had remained unsigned and during which he had made no application for a copy at all. That this rule, in the unqualified form in which it has been expressed, taken with the facts and dates of the case before the Full Bench of the Calcutta High Court, has the effect of holding that the starting period of limitation for appeal is not the date of the decree, which under s. 205 of the Code of Civil Procedure must "bear date the day on which the judgment was pronounced," but the day on which it is signed, cannot be doubted. The learned Chief Justice of this Court in *Parbati* v. *Bhola* (1) declined to adopt the rule in this unqualified form, and expressed views in which

(1) I. L. R., 9 All., 244. (2) I. L. R., 13 Calc. 104.

I entirely concur for reasons which I shall presently explain. He said :—

"In my opinion, applying s. 12 of the Limitation Act to such a case, allowance should be made for the time between the date when the decree was signed, if the delay in signing the decree delayed the applicant in obtaining a copy of the decree, and not otherwise. In such a case as that, it would clearly be, within the meaning of s. 12, time which was requisite for obtaining a copy of the decree, because a copy of the decree could not be obtained until the decree was signed by the Judge. But that is not the case here. Here no application was made until the 15th April; so that in no sense was the applicant delayed in obtaining a copy of the decree by the fact that the decree was not signed by the Judge on the date the judgment was pronounced, but was signed on the 1st April. Consequently the period between the 29th March and the 1st April, cannot in my opinion be allowed."

In appreciating the full bearing of the rule so laid down, it must be borne in mind that, in this case, the application for copies was not made by the appellant till the 15th April 1887, that is, a fortnight after the decree had been signed, a state of things similar to that which existed in the case before the Full Bench of the Calcutta High Court, and in both cases the disallowance of the period during which the decree remained unsigned would bar the appeal. Thus the two rulings are in conflict with each other, and I proceed to state my reasons why I adopt the views of the learned Chief Justice of this Court which I have just quoted.

Now, in the first place I entertain no doubt that it is necessary and indispensable for a litigant who intends to appeal from a decree which is the result of a judgment against him, and which decree must, under the law, bear date the day on which the judgment was pronounced, to apply for a copy of the decree and, if necessary, of the judgment also, before the lapse of the period of limitation for the appeal which he intends to file, whatever that period may be. This view is amply supported by the ruling of Garth, C. J. (Cun-

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ningham, J. concurring) in *Ramey* v. *Broughton* (1), which was an appeal from a decree passed on the original side of the High Court and was therefore governed by the 20 days' limitation under art. 151 of the Limitation Act. In that case the decree had remained unsigned for more than the period of limitation, and the appellant subsequently applied for and obtained a copy of the decree. It was there contended on behalf of the appellant "that where the decree was not drawn up and signed until after 20 days had expired from the delivery of the judgment, the 20 days ought to count from the time when the decree was made." In dealing with this contention, Garth, C. J., said (at p. 659-60) :—"But this is directly contrary to the express language of the law. By art. 151 of the schedule to the Limitation Act the 20 days are to be reckoned from the date of the decree; and by s. 205 of the Civil Procedure Code, the decree is to bear date the day on which the judgment is pronounced, so that the appeal must clearly be filed within 20 days from the day on which the judgment is pronounced." This rule must be read with the observation of Garth, C. J., in the course of the argument, when he said "if the appellant had applied for a copy while the 20 days were running he would not be barred," and this is the effect of the judgment in the case.

It appears to me upon general principles that it would be defeating the object of limitation to allow the would-be appellant to sleep over his right of appeal for more than the limitation period, and then by the accidental or unavoidable delay in the decree being prepared, to claim extension of the period of limitation for appealing from a decree for obtaining a copy of which he had not taken even the first step, by filing an application therefor. This construction is in my opinion supported by the words of the second paragraph of s. 12 of the Limitation Act itself. The words referring to exclusion are "the time requisite for obtaining a copy of the decree." The words "requisite" and "obtaining" as they occur in the context seem to me to assume that some definite step ancillary to the obtaining, that is, acquisition, is not only

(1) I. L. R., 10 Calc. 652.

intended to be taken, but has already been taken. The first step for "obtaining" must be to take some step towards the obtainment, and the act of "obtaining" cannot be said to have even commenced before such step. Taking it to be a sound rule of interpretation to interpret the words of a statute in their ordinary and usual sense, unless the contrary is shown, I have consulted Webster's English Dictionary, and it explains the word "obtain" to mean "to get hold of by effort; to gain possession of; to acquire," as the ordinary sense of the word. In this sense I interpret the word "obtaining" as it occurs in paragraph 2 of s. 12 of the Limitation Act, and hold that "the time requisite for obtaining a copy of the decree" cannot refer to any period antecedent to the appellant's asking for a copy by the usual mode of applying therefor, or to any period subsequent to its being ready for delivery. If at the time when the application for a copy is made, the decree is not ready, he will of course be entitled to the allowance of such portion of time during which the decree remains unsigned, along with the time which may be occupied in preparing the copy for delivery; the reason being obvious that the act of obtaining has already commenced and the delay in such a case could not be referred to any omission or neglect on his part. But when he has made no application to obtain a copy and the decree remains unsigned for a portion of, or the whole period of, limitation, he cannot claim the benefit of a matter which in no sense and to no extent frustrated or retarded any endeavour on his part to obtain a copy of the decree, the endeavour itself not having yet commenced.

As an argument against this view Pandit *Ajudhia Nath* has presented an extreme illustration of a case in which a Court closes on the very day on which judgment is pronounced, excluding the possibility of an application for a copy on that day, and does not re-open till after the lapse of the period of limitation for the appeal. The learned pleader argues that, in such a case, even if the application for a copy of the decree be made on the very day when the Court re-opens and the time occupied by the office in preparation of the copy and its delivery be excluded, it would not benefit the

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applicant or save limitation unless the appeal is filed on the very day when the copy is delivered. This result, the learned pleader contends, my view of the law necessarily involves, but which the Legislature could not have intended, for it would practically amount to a denial of the right of appeal, especially to litigants who have a distance to travel to reach the appellate Court. Upon this hypothesis the learned pleader contends that, in the case supposed, the period during which the Court was closed, though antecedent to the application for copy, must necessary be included in "the time requisite for obtaining a copy" within the meaning of the second paragraph of s. 12 of the Limitation Act.

This argument, though plausible, is purely speculative and unsound. In the first place, in the state of things supposed, it would be the duty of the litigant to know that the exceptional circumstances of his case necessitated extra diligence on his part, and he should apply for a copy immediately the judgment is delivered, and since such application need not be made to the presiding Judge, I can scarcely conceive that the closing of the office upon the rising of the Judge would be so sudden and literally immediate as to exclude the possiblity of such application being made to the office. If the application is made to the proper officer, and he, under the supposed hurry of the moment, improperly declines to take it, the matter would, of course, furnish adequate ground for holding that the application must be taken to have been made before the holidays, thus entitling the litigant to exclusion of that period as "time requisite," since the delay would not then be due to any negligence or fault on his part. But when he omits to take due steps by applying for a copy he must abide by the consequences, and cannot complain if his own want of diligence in obtaining a copy bars his appeal. After the explanation which I have given of the word "obtaining," I cannot hold that the closing of the Court for holidays was "requisite" for or ancillary to the act of obtaining a copy. The act of obtaining which begins by an application for a copy had not yet commenced by any step taken by the litigant towards that end, and if in the case supposed, the antecedent holidays were to

be included in the "time requisite," it would be giving a false duration to the actual period occupied in the act of obtainment, and I would decline to exclude the antecedent holidays in computing limitation, for I hold that in such matters, more than in any other, the salutary maxim must not be forgotten that *vigilantibus non dormientibus jura subveniunt.*

There may of course be cases in which delay in applying for a copy, or in receiving it after it is ready for delivery, is due to wholly unavoidable causes beyond the control of the litigant, but this delay being antecedent to the application, and subsequent to the time when the copy is ready for delivery, cannot be called "time requisite for obtaining a copy" within the meaning of s. 12, for such time must be taken to begin when the application for copy is made and to end when the copy is ready for delivery. Any period outside these two limits falls beyond the purview of s. 12 altogether, and if there has been delay under excusable or unavoidable circumstances, that would be a matter for consideration under s. 5, unless the appeal is *in formâ pauperis* to which that section does not apply.

The only reason suggested against such interpretation of s. 12 in the Full Bench judgment of the Calcutta High Court is "that under s. 541 of the Code of Civil Procedure it is necessary that the memorandum of appeal shall be accompanied with a copy of the decree; it would be unfair to complete the period of limitation, in all cases from the date on which the judgment was delivered, because it is obvious that things may intervene so as to prevent the decree being signed until after the expiration of the whole period of 30 days allowed for preferring the appeal, and so the appeal may be rendered impossible without any fault of the parties." With due respect for the views thus expressed, I may observe that the right of appeal is the creation of statute-law; that the right so conferred is subject to the restrictions and qualifications imposed by the statute-law itself; that those in whose favour the right is created are necessarily expected to know that among those restrictions is the period of limitation which the law allows for the

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exercise of the right; that if with this knowledge they sleep over their rights, by taking no step within limitation ancillary to filing an appeal, and allow the period of limitation to elapse, they can complain of no hardship if their right of appeal is extinguished by their own laches, as was the case before Garth, C. J., in *Ramey* v. *Broughton* (1).

In the present case the decree had already been signed on the 31st May 1887, and the defendants applied for a copy on that very day. It cannot be said that the fact of the decree having remained unsigned up to that date in any way delayed their obtaining a copy, and therefore no allowance should be made to them for the period antecedent to their application. Any other view would, I think, require that in the third column of art. 152 of the Limitation Act, we should read the words "the date of the decree" as if they were "the date on which the decree is signed," an interpretation which in my opinion is not justifiable by any rule.

I now proceed to consider the second part of the first question as enunciated by me, namely, whether the defendants, in appealing to the lower appellate Court, were entitled to deduct from the period of limitation the time intervening between the date when estimate of the costs of copying was intimated to them, that is, the 1st June 1887, and the day on which they actually paid the copying charges and fees, that is, the 9th June 1887. This part of the case has been the subject of anxious consideration by me, as it has been contended that the learn d Chief Justice in *Parbati* v. *Bhola* (2) laid down an inflexible and stringent rule that the words "requisite for obtaining a copy" as they occur in the second paragraph of s. 12 of the Limitation Act are strictly limited to such time as is occupied in preparing the copy, and that in no case and under no circumstances can they be taken to refer to any time however short which may be required by the exigencies of the condition of the applicant for the copy. And upon this hypothesis it has been argued that my ruling in *Sheogobind* v. *Ablakhi* (3) is in principle in conflict with the rule laid down by the learned Chief

(1) I. L. R., 10 Calc., 652. (2) I. L. R., 12 All. 79.
(3) I. L. R., 12 All. 105.

Justice. Such being the contention, it amounts to maintaining that the learned Chief Justice laid down the hard and fast rule that in all cases, and no matter what the exigencies of the case may be preventing the applicant from abiding by the rule, he must pay the estimated cost of the copy the moment it is intimated then and there. It is only by this interpretation that my ruling in the Single Bench can in any sense be regarded as in conflict with the rule laid down by the learned Chief Justice. But I do not understand, and certainly could not have understood, from such recollections as I had of the case of *Parbati* when I delivered my judgment in the Single Bench, that the learned Chief Justice intended to lay down any such hard and fast rule. The passage to which the argument relates is very carefully worded and must be read together. The learned Chief Justice said :—

"There is another question about the computation of time, and that is, whether this lady having had notice on the 16th April of the amount of the estimate and delayed until the 19th April to pay into Court the money required for making the copies, such delay should be allowed? In my humble judgment, delay caused by the carelessness or negligence of a party applying for a copy cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite there does not mean requisite by reason of the carelessness or negligence of the applicant, it means the time which is occupied by the officer who has got to provide that copy in making the copy."

Now, as I have understood this passage, I do not take it to mean that omission in its generic sense of being excusable or inexcusable, avoidable or unavoidable, was intended. The word does not occur, and the interval between the intimation of the estimate and the payment of the copying charges is described as "the delay caused by the carelessness or negligence of a party applying for a copy," and this the learned Chief Justice held could not be deducted from the period of limitation. The phrase occurs again towards the end of the passage, in the last sentence, which lays down that the time requisite "does not mean requisite by reason of the

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carelessness or negligence of the applicant: it means the time which is occupied by the officer who has got to provide that copy in making the copy." The passage lays down no rule as to cases where the delay has been caused through no carelessness or negligence of the applicant but by wholly unavoidable causes, and understanding the passage in this sense, I fully agree in it, fortified as I am by the absence of the word "only" or any other equivalent expression justifying the inference that the passage intended to lay down any rule of an exhaustive character so as to exclude even unavoidable circumstances. The passage is followed by remarks doubting the legal authority of a Circular Order of this Court (printed at pp. 204-5) of 1882, which prescribed rules for the guidance of subordinate Courts and provided a certain number of days in every case for the party applying for the copy, as a matter of course, for compliance with the estimate furnished by the office to litigants applying for copies (1).

I myself regard that Circular Order as one of very doubtful legal authority, and I agree with the learned Chief Justice when he laid down the rule that the important date for purposes of computation for exclusion of time under s. 12 of the Limitation Act, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant, if he chooses to apply, where he has had notice that the copy will be ready on that date. This view is in accord with the ruling of the Calcutta Court in *Gopal Chunder Roy* v. *Brojo Behari Mitter* (2), and, I may here observe, in passing, that in the case of *Sheogobind* v. *Ablakhi* (3), one of the reasons for allowing the period up to the actual delivery of the copy was, to use my own words, "because in this case no date was fixed by the officers of the Court below, either as to the date when the copy would be ready or as to the date when it would be delivered, and the copy itself was not delivered until the 10th April 1888." In that case the estimate of costs for copies was intimated on the 29th March 1888, and the copying charges were paid on the 5th April 1888, that is, within a week, a laxness of practice somewhat

(1) General Rules and Circular Orders (Civil), N.-W. Provinces, 1882, pp. 204, 205.

(2) 9 Calc. L. R. 293.

(3) I. L. R., 12 All. 105.

countenanced by the Circular Order of 1882 (*vide* Illustrations, especially D and E) already referred to, and I excused the delay in depositing the charges probably by a liberal or perhaps lax interpretation of "time requisite," and possibly in view of other circumstances which, however, are not stated in my judgment. Whatever view as to the matter of detail may be taken, it cannot be said that according to the interpretation which I have understood of the views expressed by the learned Chief Justice in the case of *Parbati*, my judgment in the Single Bench case is in any matter of principle in conflict with those views.

Reverting to the interpretation of the exact words of the statute in the second paragraph of s. 12 of the Limitation Act, I am of opinion that in the phrase "the time requisite for obtaining a copy of the decree" the word "requisite" does not refer exclusively to the exigencies of the official work of the copying department of a Court, but also to the exigencies of the applicant's situation in respect of paying in the copying charges immediately upon intimation of the estimated cost. Usually, no doubt, the law expects that the applicant for a copy is ready with the charges and fees when he makes the application, but "requisite" as it occurs in the section must not be read irrespective of the word "obtaining" which follows it in the section and which as I have already explained refers to the action of the person applying for a copy. Nor can the word "obtaining" be read as if it were "preparing," "furnishing," "supplying," "granting," "giving," "issuing," or other similar words referring to the duties or action of the copying department of a Court to the total exclusion of such time as may be unavoidably requisite to the person "obtaining" the copy of a decree. This being so, whilst I hold that carelessness or negligence in paying in the estimated copying charges should not be considered as part of the "time requisite," I hold that where the delay in payment of such charges is due to causes beyond the control of the litigant, that is, unavoidable circumstances, the rule of what I may call "requisiteness" will be available to the applicant for a copy. In saying this, I contemplate cases such as the closing of a Court

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for holidays immediately after the estimate of copying costs is intimated and cases in which for unavoidable reasons such as the court-fees stamps not being procurable, or other similar circumstances beyond the control of the litigant, the copying charges could not be immediately paid. In *Nobin Chunder Roy* v. *Brojendro Coomar Roy* (1) Garth, C. J., and Macpherson, J., seem to have held that "the matter must be determined by the practice in force in the Court concerned, as to what is requisite time for obtaining a copy." In *Gunga Dass Dey* v. *Rámjoy Dey* (2) Wilson and Beverley, JJ., in expressing their views on this point, said :—

"We are asked in second appeal to say that the District Judge is wrong in the interpretation he has put on the words 'the time requisite for obtaining a copy' in s. 12 of the Limitation Act. We think that no hard and fast rule can be laid down to meet all cases that occur under that section. Ordinarily no doubt the application for copies of the judgment and decree should be accompanied with a sufficient number of sheets of stamped paper for the copies; and parties should not be allowed to extend the period prescribed for appeal by any unnecessary delay in putting in the requisite papers. But, on the other hand, it would be grossly unfair to disallow the application if the requisite papers were not procurable, or if a mistake were made in calculating the number of sheets required. Each case, we think, must be decided on its own merits."

In this view of the law I concur, but subject to definite qualifications or rather explanations. Of course, no "hard and fast rule" of universal application can be laid down to meet the details of all cases, and "each case must be decided on its own merits," as to its details. But it is possible to lay down as a general rule or principle of universal application, that "time requisite" as used in s. 12 of the Limitation Act means only the interval between the time when the copy is applied for and the time when it is ready for delivery; that during that interval due diligence on the part of the litigant is required by the law, and that no delay, unless such as was caused by circumstances over which the litigant had no control and which he

(1) 12 Calc., L. R., 541. (2) I. L. R., 12 Calc., 30.

could not by due diligence have avoided, can form part of the time requisite for obtaining a copy, the question whether such circumstances existed is a pure question of fact and not a matter of discretion such as is implied in the phrase "sufficient cause" as it occurs in s. 5 of the Limitation Act. The very word "requisite," as it occurs in s. 12, understood in its natural sense, means, as Webster explains it, "so needful that it cannot be dispensed with," thus importing that no discretionary power is intended to be conveyed by the section and that its operation is therefore radically different from the discretionary power contemplated by paragraph 2 of s. 5.

In the present case the application for copy of the decree was made on the 31st May 1887, and the estimate was intimated the very next day, namely, the 1st of June 1887. Why the defendants did not immediately furnish the copying charges, and delayed payment till the 9th June 1887, does not appear, nor does their application of the 27th August 1887 contain any statement of any unavoidable cause for the delay, although the object of the application was to secure reconsideration of the Judge's order of the 2nd August 1887, whereby he directed that the appellants (defendants) were to be informed that their appeal was beyond time. Nor is any explanation for the delay now offered by the learned Pandit *Ajudhia Nath* who appears on their behalf in this Court, other than the circumstance that some of the defendants are minors and that the delay of eight days was not unreasonable. But it is not shown nor affirmed how this circumstance delayed the payment of copying charges immediately upon the intimation of the estimate on the 1st June 1887, and I hold therefore that under the circumstances of this case, so far as they are apparent to us, the delay must naturally be attributed to carelessness or neglect in complying with the estimate, and that therefore the period between the 1st and the 9th June 1887, cannot in any sense be regarded as time requisite for obtaining a copy, and must therefore not be excluded from the period of limitation.

The effect of the views which I have expressed on both parts of the first question is to hold that the defendants' appeal to the lower

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appellate Court was beyond limitation when it was presented on the 30th June 1887.

What effect the minority of some of the defendants has upon the case is the subject of the second question as enunciated by me. And upon this point I am of opinion that the defendants-respondents have no case. It is true that some of them are minors, but they are duly represented by guardians whose interests are the same as theirs, and the fact of minority could not prevent the guardians from showing due diligence on behalf of the minors. It is noticeable that s. 7 of the Limitation Act, in extending the period of limitation on account of minority, refers only to suits and applications and makes no mention of appeals, and its provisions are therefore unavailable to the minor defendants.

Then as to the third question, namely, whether the defendants' appeal to the lower appellate Court presented a fit case for extending limitation under s. 5 of the Limitation Act, my answer, after what I have already said, must necessarily be in the negative, for no "sufficient cause" within the meaning of that section has been shown, or even alleged. On the contrary, it appears from the facts already mentioned that the defendants obtained the copy of the decree on the 11th June 1887, and they would be within time if they had shown ordinary diligence in filing their appeal to the lower appellate Court; but they did not do so till the 30th of June 1887, when the period of limitation had expired, even if all allowance of time were to be made in their favour according to the Circular Order of 1882, to which reference has already been made.

But then Pandit *Ajudhia Nath* argues that the defendants were under a *bonâ fide* impression that they would be entitled to the exclusion of the period during which the decree had remained unsigned; that even if this impression be regarded as a mistake of law it cannot in view of the Full Bench ruling of the Calcutta High Court in *Bani Madhab Mitter* v. *Matungini Dasi* (1), which justifies the impression, be regarded as an unnatural, unreasonable or unexcusable mistake of law, and that it must therefore be taken into account

(1) I. L. R 13 Calc., 104.

in applying the second paragraph of s. 5 of the Limitation Act to the circumstances of this case. As an authority for this argument the learned Pandit has relied upon another ruling of a Division Bench of the Calcutta High court in *Huro Chunder Roy* v. *Surnamoyi* (1) where Mitter and Grant, JJ., concurred in saying:—"It appears to us that the lower appellate Court in this case has rejected the appeal as filed out of time and refused to admit it under s. 5, on the ground that a *bonâ fide* mistake made by the appellant in respect of the limit of time within which according to law he is bound to file his appeal is under no circumstances a valid ground for admitting an appeal under s. 5. We are of opinion that is not a correct view of the provisions of s. 5. It is for the Judge in each case to exercise his discretion, having regard to the particular facts established before him." In the case before the learned Judges the filing of the appeal to the District Judge was delayed by reason of an impression that the appeal would lie to the High Court, and they held that such an impression, though erroneous in law, was a sufficient cause for extending the period of limitation under the latter part of s. 5 of the Limitation Act.

Now I may say at once that this ruling is entirely in favour of the learned Pandit's contention, but with due respect for it I am wholly unable to follow it. I had to consider a similar question in *Jaglal* v. *Harnarain Singh* (2) where the contention for the appellant was that there had been a *bonâ fide* mistake of law as to jurisdiction, and the aid of s. 5 of the Limitation Act was invoked by asking the Court to resort to the analogy of the rule contained in s. 14 of the Limitation Act. In dealing with this contention I pointed out that s. 14 of the Limitation Act applied only to suits and applications and had no concern with appeals, and that to apply it to appeals would be to regard the latter part of s. 5, to that extent, as surplusage. I did not rule that the analogy of s. 14 might not in some cases be available to the apppellant in claiming extension of limitation by showing that he had "sufficient cause" for delaying the appeal, but I distinctly pointed out that such suffi-

(2) I. L. R. 13 Calc., 266. (3) I. L. R. 10 All. 524.

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cient cause could not include bare mistakes of law, however easily they may have been induced. The same question was more fully considered by me in *Ramjiwan Mal* v. *Chand Mal* (1) where, as to the question of *bona fides* of erroneous impressions of law, I said:—"I am opinion that, so far as this contention concerns mistakes of law, the authority of the maxim *ignorantia legis neminem excusat*, has been so formally settled both in England and India that it would be the shaking of established authority to maintain that ignorance of law or mistakes of law are reasons for the excuse, and as such, furnish elements for extending the period of limitation which the statute-law has provided. In my opinion s. 14 of the Limitation Act itself does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent and clear, but is limited to cases where from *bona fide* mistakes of fact the suitor has been misled into litigating in a wrong Court. The phrase "other cause of a like nature" which occurs in the section is rather vague, but it cannot be held to undo the effect of the constitutional obligation which the law imposes upon every citizen to know the law of the land in which he lives." The law jealously guards its behests and will not tolerate their infraction. Speaking with strict accuracy, there can be no such thing as a *bonâ fide* mistake of law, for good faith implies due care and caution. It is true that *lex non cogit ad impossibilia*, but knowledge of law is not an impossibility, but a duty imposed upon every human being who lives under the protection of law. To use the words of West, J., in *Sitaram Parugi* v. *Nimba* (2) "mere ignorance of the law cannot be recognized as a sufficient reason for delay under s. 5 of the Act, for that would be a premium on ignorance."(3).

It now remains for me to consider the last part of the learned Pandit's argument on the point which forms the subject of the fourth question as enunciated by me, namely, whether the fact that the lower appellate Court admitted the defendant's appeal and heard

(1) I. L. R., 10 All., 587.
(2) I. L. R., 12 Bom., 320.
(3) See *Krishna* v. *Chathappan*. I. L. R., 13 Mad., 269.

and determined it, precludes us from interfering at this stage with the admission of the appeal in that Court. The learned Pandit relies upon a Single Bench ruling of Sir Louis Jackson, J., in *Raj Coomar Roy* v. *Shaikh Mahomed Wais* (1), where he laid down that "it was entirely in the discretion of the Judge to consider whether sufficient cause had or had not been shown for not presenting the appeal within proper time, and that this Court has no authority to interfere with the exercise of this discretion." I respectfully think that this somewhat unqualified repudiation of the jurisdiction of the High Court in respect of the exercise of discretionary powers by the lower Courts is scarcely justified by any authority or general principle of law, and in matters of limitation it is certainly inconsistent with the language and spirit of s. 4 of the Limitation Act which, as Sir Richard Garth, C. J., pointed out in *Ramey* v. *Broughton* (2) irrespective of the pleadings of the parties, casts upon the Judge the duty of determining whether the appeal is within limitation so as to be heard by him. This being so, it seems to me to follow that it is the duty of the second appellate Court to see whether the duty thus cast upon the Judge of the lower appellate Court has been properly discharged by him, and to interfere, if by a wrong, improper and judicially unsound exercise of discretion under s. 5 of the Act, he has admitted an appeal which was barred by limitation. To hold otherwise would be to confer an amount of finality and conclusiveness upon the adjudications of District Judges in this respect which the law could never have intended, for the logical result of such a view would be to paralyze the hands of this Court, even in a case where the lower appellate Court by a grossly improper and unsound exercise of discretion under s. 5 of the Act had admitted, and heard, and determined an appeal which had for a century or more been barred by limitation. What would under such circumstances become of the laws of limitation which have justly been denominated as "statutes of repose?" I cannot but hold that the imperative requirements of s. 4 of the Limitation Act not only justify us, but require us, as a Court of second appeal, to satisfy ourselves whether the appellate Court has properly applied

(1) 7 W. R., 337. (2) I. L. R., 10 Calc., 652.

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the provisions of s. 5 of that enactment, and, if the discretion has been wrongly exercised, to undo its effects by interference in second appeal.

In opposition to this view, however, the ruling of the learned Chief Justice and our late colleague Mr. Justice Oldfield in *Fatima Begam* v. *Hansi* (1) has been cited and relied upon. That was a case of a somewhat peculiar character, and the appeal was presented to the District Judge long after the period of limitation, but was admitted by him in consideration of the especial circumstances of that case, by exercising discretionary power to extend limitation under s. 5 of the Limitation Act. In second appeal the matter was brought to the notice of this Court, and whilst Mr. Justice Oldfield considered the circumstances of that case as constituting sufficient cause to justify the District Judge in admitting the appeal under s. 5, the learned Chief Justice expressed himself in very guarded language, which I wish to quote here, as the ruling has been the main reason why this case has been referred to the Full Bench. The learned Chief Justice, after stating the facts and dates of the case went on to say (at p. 246) :—

"I may at once say that if I had been sitting as the Judge of Allahabad, I would not have held that the defendant had shown 'sufficient cause' within the meaning of s. 5 of the Limitation Act. The Judge of Allahabad, to whom the application to admit the appeal was made, exercised his discretion and admitted it. In my opinion we ought not to interfere, unless when the Judge has clearly acted on insufficient grounds or has improperly exercised his discretion. We ought not to interfere with the discretion of the Judge when he has applied his mind to the subject-matter before him. However, as I have said before, under these circumstances I would not have admitted the appeal, but I do not see my way to hold that the Judge has so improperly exercised his discretion as to say that the appeal ought not to have been admitted."

Now in this passage it is important to notice that the learned Chief Justice did not repudiate the jurisdiction of the second appel-

(1) I. L. R., 9 All., 244.

late Court in matters of discretionary admission of appeal by the lower appellate Court; this point distinguishes the case in principle from Sir Louis Jackson's ruling in the Calcutta case. Again, the learned Chief Justice expressed his opinion that if he were presiding in the lower appellate Court he would not have admitted the appeal, but he refrained from interference, because, although not fully agreed with Mr. Justice Oldfield's view as to the sufficiency of the cause for delay, he was not prepared to go the length of holding that the exercise of discretion by the District Judge was absolutely improper so as to require interference in appeal. This, then, is the exact scope of the rule laid down by the learned Chief Justice in that case; it does not repudiate the jurisdiction of the second appellate Court to interfere, but points out that, when discretion has been actually exercised, it must not, upon light grounds and in the absence of strong reasons, be disturbed in appeal. In the principle thus expressed I fully concur, because, in matters of this kind, as indeed in matters of conclusions on the weight of evidence, the appellate Court should always act cautiously and not disturb findings of the lower Court, unless it is absolutely satisfied that the conclusions at which the lower Court arrived were erroneous.

But whilst I thus express my concurrence in matters of principle expressed by the learned Chief Justice, in that case, I respectfully confess that if I were a member of the Bench whi h heard it, I should have, judging from the facts as stated in the report, dissented from Mr. Justice Oldfield's view a to the sufficiency of the cause for delay, and, agreeing with the learned Chief Justice, in so far as he regarded the circumstances as insufficient cause, should have disagreed with him in the view that the case did not call for interference. According to my view of that case, I should have held that the District Judge had exercised an improper discretion in admitting the appeal after limitation, and I should by my decree, have undone the effects of such wrong admission of the appeal. And for the reasons which I have stated, I would do the same here by setting aside the District Judge's order of the 27th August 1887, whereby he admitted the appeal, and by declaring

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that he should have dismissed it with such effect as such dismissal may have upon the rights of the parties; for I observe that the District Judge had also certain cross-objections by the plaintiff under s. 561 of the Civil Procedure Code before him.

With this answer I would return the case to the Division Bench which has referred it to the Full Bench.

EDGE, C. J.—I have had an opportunity of reading the judgment of my brother Mahmood in this reference, and with that judgment, subject to what I am about to say, I agree. The difference, if there is any, between us, I doubt if there is any, arises on the construction of s. 12 of the Indian Limitation Act. So far as I can see, the only section in the Indian Limitation Act, 1877, which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act is s. 5. So far as I can see, there is not any other section in the Indian Limitation Act, 1877, which enables a Court to admit a suit or an application, other than an application for a review of judgment, which is presented after the period prescribed by that Act for the institution of a suit or the presentation of an application.

Ss. 6 and 10 exclude certain cases from the period of limitation prescribed by the Act.

Ss. 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 merely enact how the prescribed periods of limitation are to be computed and what allowances are to be made in such computations. In making such computations a Court may have to ascertain certain facts, but those sections relating to the computation of time do not appear to me to give a Court any discretion as to extension of time or the admission of a suit, appeal or application.

In order to ascertain how, under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a decree must be computed, and what allowances, if any, can be made in computing that time, and to test the proposition that a Court in computing the time to be allowed under s. 12 for the obtaining by a party of a copy of a decree or a judgment has a discretion in the matter, I shall take

the case of a person entitled under the Code of Civil Procedure to appeal, who, being unable to pay the fee for the petition of appeal, presents an application for leave to appeal as a pauper. I take such a case, for, as I shall presently show, if any allowance is to be made to such a person in respect of delay in obtaining a copy of a decree or a judgment, it must be made under s. 12 and cannot be made under s. 5 of the Act.

A litigant cannot appeal as a pauper unless his application for leave to appeal as a pauper be allowed under s. 592 of the Code of the Civil Procedure. Art. 170 of the second schedule of the Indian Limitation Act, 1877, provides that an application for leave to appeal as a pauper must be made within 30 days from the date of the decree appealed against. The periods of limitation for appeals are specified in the second division and those for applications in the third division of the second schedule of that Act. S. 12 of the Indian Limitation Act, 1877, expressly applies not only to appeals but to applications for leave to appeal as a pauper.

I consequently conclude that the Legislature in framing and passing the Indian Limitation Act, 1877, did not confound appeals with applications for leave to appeal as a pauper, and did not overlook the distinction between an appeal and an application for leave to appeal as a pauper, a distinction which is kept clearly in view in the Code of Civil Procedure.

By s. 541 of the Code of Civil Procedure, so far as appeals from original decrees are concerned, by that section as made applicable by s. 587, so far as appeals from appellate decrees are concerned, and by s. 541 as made applicable by s. 590, so far as appeals from orders under the Code of Civil Procedure are concerned, appeals from original decrees from appellate decrees and from such orders under the Code of Civil Procedure as are appealable must be made in the form of a memorandum in writing presented by the appellant. That "memorandum in writing" is in pauper cases the "memorandum of appeal" referred to in s. 592 of the Code by which the application for leave to appeal as a pauper must be accompanied.

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As I have pointed out, the Legislature in the Code of Civil Procedure and also in s. 12 of the Indian Limitation Act, 1877, and in the second schedule to that Act, observed a distinction between an appeal and an application for leave to appeal as a pauper, and did not confuse the one with the other.

The first paragraph of s. 5 of the Indian Limitation Act, 1877, applies to all suits, appeals and applications for which a period of limitation is by that Act prescribed, including applications for leave to appeal as a pauper. The second paragraph of that section applies only to appeals and to applications for review of judgment, and does not apply to suits, or to applications other than applications for review of judgment; it consequently, as has been held, does not apply to application for leave to appeal as a pauper. Having regard to the principles of construction and to the distinction elsewhere observed by the Legislature between appeals and applications for leave to appeal as a pauper, it could not be held that the Legislature intended the second paragraph of s. 5 of the Indian Limitation Act to apply to applications for leave to appeal as a pauper, or that an application by a pauper for leave to appeal as a pauper, and, on allowance of his application, his pauper appeal, should be treated as one and the same thing.

By s. 592 of the Code of Civil Procedure a person may be allowed to appeal as a pauper, subject to the rules contained in Chapters XXVI, XLI, XLII and XLIII of that Code, in so far as those rules are applicable. A perusal of that section and ss. 541, 587, and 590 show that the memorandum of appeal in pauper cases must be accompanied by a copy of the decree or order appealed against and of the judgment on which it is founded. It is thus necessary that an application for leave to appeal as a pauper must not only be presented within 30 days from the date of the decree appealed against, but must be accompanied by the memorandum of appeal, a copy of the decree or order appealed against, and a copy of the judgment upon which the decree or order is founded. An order allowing a person to appeal as a pauper is an order admitting his appeal as a pauper. As there can be no appeal by a pauper as such

unless an order allowing him to appeal as a pauper has been made, I conclude that the second paragraph of s. 5 of the Indian Limitation Act, 1877, not only does not apply to applications for leave to appeal as a pauper, but is inapplicable to an appeal by a pauper as such, and that the Legislature did not intend that want of pecuniary means to present an application for leave to appeal as a pauper within the specified time should, so far as such an application or an appeal by a pauper is concerned, extend the time within which such an application should be made, or should be treated as "sufficient cause" for the non-presentation of an appeal by a pauper as such within the period of limitation prescribed. In other words the effect of ss. 4 and 5 of the Indian Limitation Act, 1877, is, in my opinion, to deprive a litigant who desires to appeal as a pauper of all right to appeal as a pauper if he has not within the prescribed period of 30 days, computed as provided by the Act, presented his application for leave to appeal as a pauper, and this, no matter what the cause may have been which presented him from presenting his application within the 30 days so computed. The next question is how, in the case of a person desiring to appeal as a pauper, are the 30 days to be computed so far as s. 12 of the Indian Limitation Act, 1877, is concerned. Under that section the day from which the period of 30 days is to be reckoned, and "the time requisite for obtaining" a copy of the decree appealed against and a copy of the judgment on which it is founded, are to be excluded from the computation of the period of limitation. As I have shown, a copy of the decree appealed against and a copy of the judgment upon which it is founded must accompany an application for leave to appeal as a pauper. In ascertaining the time which was requisite for obtaining a copy of such decree and a copy of such judgment in the case of an application for leave to appeal as a pauper, can any allowance be made for delay caused by the inability, on receipt of the estimate, of the pauper, by reason of his want of money, to pay for such copies?

If such an allowance is to be made in the computation of time, in respect of what period is it to be made? Is the period of limitation within which an application for leave to appeal as a pauper may be made to be extended until he is in a position to pay for the copies

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of the decree and the judgment? He might not be in a position to do so for five, ten, or twenty years. To make such an allowance in the computation of time would be to extend the period of limitation. Such could not have been the intention of the Legislature, although the poverty of the pauper and his consequent inability to pay the charges for the copies and to obtain them, might be owing to excusable and unavoidable circumstances in his case. The case which I have put might be a hard one upon the pauper, but it would equally hard upon his opponent who had obtained his decree, if he were to be left in uncertainty as to his rights and liabilities until such time as the pauper might be in a position to obtain leave to appeal as a pauper.

To take another illustration from the case of a pauper.

In computing the time requisite for obtaining copies of the decree and the judgment, could a Court make allowance for a delay by a pauper in obtaining such copies resulting from an unavoidable accident to the pauper? If it could, why should the Court not also make allowance in such computation for the delay resulting from the unavoidable circumstance of the pauper being too poor to pay for such copies? If the Court could not do so in the one case, I can see no principle upón which it could do so in the other. It appears to me that the Indian Limitation Act, 1877, so far as pecuniary means are concerned, contemplates two classes of litigants, and two classes only, namely, those who are paupers, and those who are not, and that, so far as s. 12 of that Act is concerned, we must apply the same principles of construction to that section in the case of a litigant who is not a pauper as in the case of a litigant who is a pauper.

In my opinion a Court in computing under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the office in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who

has applied for them. If a decree had not been drawn up and signed at the time when an application for a copy of it was made, and the making of the copy was thereby delayed, such period of delay must be allowed for in computing the time which was requisite for obtaining the copy. Copies of decrees and judgments are not made for the use of parties until the estimated charges for making them have been paid. Sometimes delay might be caused in the receipt by the office of the estimated charges owing to the stamps not being procurable, or to the office not being open to receive payment of those charges when the estimate should have been complied with. Such period of delay, and periods of delay arising from similar causes beyond the control of the applicant, and not being the result of any action or want of action on his part, should, I think, be allowed in making the computation. Sometimes, owing to pressure of work in the copying department, a copy of a decree or judgment cannot be made for some days after the charges for making the copy have been paid. The period of such delay would also be allowed for in computing the time which was requisite for obtaining the copy. If the party applying for a copy of a decree or judgment failed to inform himself of the time when such copy would be ready and thereby did not obtain it when it was ready to be delivered to him, it appears to me that the period of such delay could not be allowed in computing the time which was requisite for obtaining the copy.

A question as to whether an appellant or an applicant for review of judgment had "sufficient cause" within the meaning of the second paragraph of s. 5 of the Indian Limitation Act, 1877, does not arise until the computation of time has been made.

There may be many a cause for delay in obtaining a copy of a decree or judgment, which, although it could not be considered in the making of the computation to be made under s. 12, might be a sufficient cause within the meaning of the second paragraph of s. 5 for the appellant or the applicant for a review of judgment not having presented his appeal or his application within the period prescribed. In my opinion, negligence, carelessness, or want of means at the time on the part of the applicant would not be suffi-

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cient cause, within the meaning of s. 5. A litigant who applies for a copy without taking the precaution to have in his pocket sufficient money to pay the charges for the copy, or who delays so long in making his application for the copy, or in paying the estimated charges for it, as to leave him insufficient time to present his appeal or application for review of judgment within the period prescribed, cannot on such grounds in my opinion be held to have had sufficient cause for not presenting his appeal or application within such period.

It is for the appellant or the applicant for a review of judgment whose appeal or application has not been presented within the period prescribed, to satisfy the Judge of the Court that he had sufficient cause for not presenting the appeal or making the application within such period. In this case that has not been done.

As to the case of *Fatima Begam* v. *Hansi* (1) I need only say that I am now, and have long been satisfied, that, on the facts of that case Mr. Justice Oldfield and I ought to have given effect to the objection that the appeal, when it was admitted by the District Judge of Allahabad, was improperly admitted, no sufficient cause having been made out for the delay.

I concur in the order proposed by my brother Mahmood.

BRODHURST, J.—The facts of this case have been most fully stated by my brother Mahmood, and to repeat them would be useless.

I concur in the exposition of the law by the learned Chief Justice, and in the order proposed by my brother Mahmood.

YOUNG, J.—In this case, when the arguments on each side had had been fully heard before the Chief Justice and myself, the appellant's counsel raised a new point not taken in the pleas of appeal to this Court, *viz*, that the lower appellate Court had improperly admitted the present respondent's appeal, inasmuch as the said appeal to the lower appellate Court was barred by limitation. An inspection of the file below showed that the lower appellate Court, having been apprised by the officer of the Court that the said appeal ought not

(1) I. L. R., 9 All. 944.

to have been admitted, as it was one day beyond time, at first ordered that the appellant before it be informed that his appeal was struck off as being time-barred, but subsequently decided the appeal on the merits and gave respondent a decree in his favour.

The objection now raised ought to have been stated in the memo. of appeal to this Court. As the point however is one of limitation and involves some questions of much importance, it was deemed proper that it should be referred to a Full Bench, and this the more, as conflicting rulings exist in regard to some of the matters herein involved.

I do not think it necessary to recapitulate the facts of this case in detail, and it is sufficient for me here to say that I fully concur in the ruling in *Parbati* v. *Bhola* (1) that the words "time requisite for obtaining a copy" in s. 12 of Act XV of 1877, only refer to the time occupied by the Court or its officer in furnishing the copy, and has no reference to any time required by the applicant owing to his own apathy or ignorance.

Thus the non-signature of the decree by the Judge would be no cause for indulgence to the applicant for copy, unless the latter had applied prior to signature of the decree, and had been delayed by the fact of non-signature.

So again if an applicant, after being informed of the probable cost of the copy, takes time to go and procure his money, he would not be entitled to any deduction of time on that account. So again, if, after receiving intimation that the copy is ready, or is to be ready on a certain date, the applicant delays to take it on such date, he would not be entitled to any deduction for such days, seeing that such time cannot properly be called "time requisite," as it would not have been needed but for the applicant's own laches.

I am also of opinion that any indulgence by way of extension of the period of limitation can only be granted, not under s. 12, but under s. 5 of the Limitation Act, and subject to the provisions of that section, that is, "when the appellant or applicant satisfies

(1) I. L. R., 12 All. 79.

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the Court that he had sufficient cause for not applying within the prescribed period of limitation."

There has been no attempt so to satisfy the Court here, as far as I am aware.

For these reasons, I consider the objection valid, and I concur in the order proposed by my brother Mahmood.

On the case being brought up before the Division Bench, the following order was passed on the 14th June 1890, by Edge, C. J. and Young, J.

"Having regard to the opinion of the Full Bench expressed in the reference in the case, we allow this appeal with costs, dismiss with costs the appeal and objection filed in the lower appellate Court, and restore the decree of the first Court."

Appeal allowed.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

ATA-ULLAH AND ANOTHER (PLAINTIFFS) v. AZIM-ULLAH AND ANOTHER (DEFENDANTS).

Muhammadan Law—Mosque not capable of dedication or exclusive appropriation to particular sect—Muhammadans—Muhammadi or Wahabi sect—Disturbing a religious assembly—Right to say "Amin" loudly during worship.

According to the Muhammadan Law, a mosque cannot be dedicated or appropriated exclusively to any particular school or sect of Sunni Muhammadans. It is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience. No one sect or portion of the Muhammadan community can restrain any other from the exercise of this right.

Members of the Muhammadi or Wahabi sect are Muhammadans, and as such entitled to perform their devotions in a mosque, though they may differ from the majority of Sunni Muhammadans on particular points.

But any Muhammadan would commit a criminal offence who, not in the *bonâ fide* performance of his duties, but *malâ fide*, for the purpose of disturbing others engaged in their devotions, made any demonstration, oral or otherwise, in a mosque, and disturbance was the result.

So *held* by the Full Bench. *Queen-Empress* v. *Ramzan* (1) referred to.

Per Mahmood, J.—According to the Muhammadan ecclesiastical law, the word "*Amin*" must be said and should be pronounced at the end of the prayer ending with

(1) I. L. R. 7 All. 461.

Sura-i-Fateha; but there is no authority for holding that it should be pronounced in a loud or in a low tone of voice; and (provided no disturbance of the public peace is caused) a Muhammadan pronouncing the word loudly, in the honest exercise of conscience, commits no offence or civil wrong

THE plaintiffs in this case sued for a declaration that a certain mosque situate in Jalalipura, Benares, was a place of public worship in which they, as Muhammadans, were entitled to pray and perform other religious devotions. It appeared that there had, for a considerable period, been differences of opinion between the plaintiffs and the defendants in connection with the conduct of worship at the mosque. The plaintiffs described themselves as "Muhammadis," and the name applied to them (though they objected to it) by their opponents, was "Wahabis." The defendants belonged to the Hanafi sect of Muhammadans. The differences between the parties led to proceedings being taken in the Court of the District Magistrate of Benares, who, by an order dated the 15th December, 1884, found that the Hanafi party, to which the defendants belonged, were in possession of the mosque, and directed that they should be entitled to retain such possession until a competent Court should otherwise determine. This order was passed under Chapter XII of the Criminal Procedure Code, and the present suit was instituted for the purpose of setting it aside.

The suit was resisted principally on the ground that the mosque was built by the Hanafi sect of Muhammadans, and used by them ever since as their place of worship; that the plaintiffs were not members of that sect, and were not orthodox Muhammadans at all, and had consequently no right to use the mosque as a place of worship. The chief differences of opinion between the Muhammadi or Wahabi sect, to which the plaintiffs belonged, and the Hanafi persuasion, of which the defendants were members, appeared to be the following. According to the lower appellate Court, "the Mudammadis do not look upon *Ijmaa*, or the consensus of opinion of what we may call the fathers of the Church, or *Kiyas*, analogical deductions by certain expounders of the law, as of obligatory authority, while, on the other hand, the Hanafis consider the authority of *Ijmaa* and *Kiyas* as beyond question or dispute." Again, "the

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Muhammadis reject the principle of *taklid, i.e.,* refuse to addict themselves to the doctrines of any of the four Imam Mujtahids, while the Hanafis follow Abu Hanifa and his disciples." Further, "the Muhammadis believe that the *mimbars* or pulpits in mosques should be of wood, and not of masonry or stone." The difference, however, which excited most animosity between the two parties was that while the Muhammadis when at prayer pronounced the word "*Amin*" in a loud voice, and raised their hands every time when bending or, as it was termed, making the *Rafaúlyadain,* the Hanafis pronounced the "*Amin*" in a low voice, and did not raise their hands in bending. The nature of the controversy to which this difference of opinion has given rise between the Muhammadis and their opponents is discussed at length in the judgment of Mahmood, J., in *Queen-Empress* v. *Ramzan* (1).

The main issue framed by the Court of first instance (Subordinate Judge of Benares) was:—"Are the Hanafi Sunnis alone entitled to read the *namaz* or offer prayers? Can such restrictions be imposed?" Upon this issue, the Subordinate Judge observed:—

"As to the question of the plaintiffs' right to offer prayers and perform religious duties in the mosque, I think the claim cannot be based, as the plaintiffs seem to think from the wording of their plaint, on the ground either of contribution to the building, or of prescription. But they have taken also a higher ground and that ground is, I think, incontrovertible. They belong undoubtedly to the orthodox class of Muhammadans, and as such, they have a right, as much as the defendants, to use the mosque for public worship and for other religious purposes for which a mosque can be used. The defendants have no right to close its door against every other class except their own, the Hanafis. It is immaterial whether the plaintiffs have seceded from the sect of Hanafis or they have been from the first Muhammadis, *Ahl Hadis,* Mohdassins, or if as the defendants prefer to call them, Wahabis. Call them by whatever name you please, they are and must be regarded as Sunni Muhammadans, and whether they are seceders from the Hanafis or not,

(1) I. L. R., 7 All., 461.

their true orthodoxy, or the fact of their being Sunnis or those "who maintain the most obvious interpretation of the Kuran" and the obligatory force of the traditions in opposition to the innovations of the sectaries, cannot for a moment be doubted. The only differences of opinion which exist between the plaintiffs as Muhammadis, and the defendants as Hanafis are, that in prayers the former pronounce the word '*Amin*' aloud, and raise their hands every time before they bend or make what is called the *Rafaúlyadain*, and the latter pronounce '*Amin*' in a low voice, and do not raise their hands in bending. These are pure matters of detail as to the minor points of ritual, and make no difference in principle involving the very essence of their religious beliefs. As shown by Mr. Justice Mahmood in his learned exposition of the Muhammdan Law, reported in I. L. R., 7 All., 465-467, three out of four schools founded by the four orthodox *Imams, viz.*. Shafai, Malik and Hanbal, evolve the doctrine of pronouncing '*Amin*' aloud from the same traditions from which the fourth or that founded by Abu Hanafi draw that the word should be pronounced in a low voice. One of the highest authorities of the Hanafi School, to which the defendants belong, is the Durri Mukhtar, "in which the strongest text is to be found against saying '*Amin*' aloud; but the text itself falls far short of substantiating any rule of the ecclesiastical law by which alone the defendants can claim the exclusion of the plaintiffs on the ground of apostacy or breach of the essential principles of religion." The rule is as follows:—"It is in accord with the practice of the Prophet to say '*Amin*' in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment." As very justly remarked by Mr. Justice Mahmood, "Even this passage only relates to the efficacy or validity of the prayer of the person who says '*Amin*' aloud or in a low tone. There is absolutely no authority in the Hanafia School of Muhammadan Ecclesiastical Law which goes to maintain the proposition that if any person in the congregation says the word '*Amin*' aloud at the end of the 'Sura-i-Fateha,' the utterance of the word causes the smallest injury, in the religious sense, to the prayers of another person in the congregation, who,

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according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries, like Turkey, Egypt and Arabia itself, Hanafis and Shafias go to the same mosque and form members of the same congregation, and whilst the Hanafis say the word '*Amin*' in a low voice, the Shafias pronounce it aloud." In this case, there is evidence to prove, and it has not been rebutted and I believe cannot be rebutted, that the same practice was followed in this very Musjid till a quarrel ensued between the parties about some family matter or matters connected with their brotherhood.

"Then again as to the *Rafaúlyadain*, or the raising of hands, it appears to me to be expressly (to quote again from the words of Mr. Justice Mahmood) sanctioned by "the celebrated collections of traditions (*Siha*) of Bukhari and Muslim, both equally acknowledged as accurate traditionists by all the Schools of Sunni Muhammadans," *Vide* Sahi-ul Bukhari, page 102, and Sahi Muslim, page 168.

"I conclude with another quotation from the decision of Mr. Justice Mahmood. "A mosque once so consecrated (*i. e.*, by public worship) cannot in any case revert to the founder, and every Muhammadan has a legal right to enter it, and perform devotions according to his own tenets, so long as the form of worship is in accord with the recognized rules of Muhammadan Ecclesiastical law." Nothing has been shown on the part of those who resist the legal claim of the plaintiffs, that the form of worship adopted by the plaintiffs is contrary to or inconsistent with the recognized rules of the orthodox Sunnis. I therefore decree that the mosque is a public place of worship, and open to all Sunnis, and that the plaintiffs have full liberty to exercise their religious rites and offer prayers in the mosque. Costs in full."

The defendants appealed from this decision to the District Judge of Benares. The Judge came to the conclusion that the mosque was originally intended for and had been long used as a "place for Hanafi worship," and held that it was "most undesirable that Muhammadis should be held entitled to enter into a congregation

of Hanafis in a mosque constructed for public worship according to the Hanafi ritual and long used for such worship, unless they choose to conform so far to Hanafi feelings as to make their presence tolerable. If a minority has rights, so has a majority, and the Hanafis' ideas of religious liberty may well be hurt if they cannot say their prayers in their mosque as they have been accustomed and desire to say them, without the risk of annoyance or disturbance."

The Judge proceeded to discuss the following questions as "the main issues to be considered":—

"1. Do the Muhammadis or Wahabis belong to any of the four principal divisions of Sunnis? Are they Sunnis at all?

"2. Do they so far differ from the Hanafis in religious opinions and observances that the Court should hold them not entitled to what they claim in connection with the mosque concerned?

Upon the first of these issues, the Judge held that the plaintiffs did not follow any of the four Imams, but that there were apparently "classes of Sunnis outside the followers of the four Imams," and that the plaintiffs were Sunnis of this kind. Upon the second issue, the Judge referred to the differences of opinion already mentioned, and drew from them the inference that "the Muhammadis regard as of no intrinsic value what the Hanafis regard as of supreme authority;" and he decided this issue in the affirmative. He described the Muhammadi or Wahabi sect as seceders from the orthodox body of Sunnis, and concluded that the plaintiffs "should not be regarded as competent to use the mosque as of right against the wishes of the defendants and the Hanafi party they represent." He accordingly decreed the appeal and dismissed the suit.

The plaintiffs appealed to the High Court, the principal grounds of appeal being as follows:—

"1. The theory that the "mosque was constructed for public worship according to the Hanafi ritual" is opposed to the Ecclesiastical law of the Muhammadan community.

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"2. The plaintiffs-appellants have the right to use the mosque as a place for worship, whether or not they acknowledge the spiritual authority of the four principal disciples of their prophet.

"3. A man does not cease to be a Muhammadan by reason of his refusal to recognize the spiritual authority of the four *Imams*.

"4. The lower appellate Court records a distinct finding that the plaintiffs-appellants are Sunnis, and yet the Court refuses to recognize their right to go to the mosque for the purpose of performing worship in the form binding upon the conscience of the Sunnis.

"5. The observances of saying the word *Amin* aloud and raising the hands in prayer are not ceremonies exclusively in fashion among the Muhammadans of the class to which the plaintiffs-appellants belong, and they cannot, therefore, be regarded as out of place and improper in any place of Muhammadan worship.

"6. The Muhammadan Ecclesiastical law recognizes no such division of the Muhammadan Church as is referred to by the lower appellate Court, and the defendants-respondents themselves repudiate the idea of such a division.

"7. The defendants-respondents admit that the mosque in question was never designed to be exclusively used for the worship of the Hanafis."

The appeal was referred to the Full Bench for disposal.

Mr. *Amiruddin*, for the appellants.

The Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal*, and Munshi *Ram Prasad*, for the respondents.

EDGE, C. J.—This suit was instituted in order to determine whether the plaintiffs were or were not entitled to perform their devotions in the mosque at Jalalipura in Benares according to their view of the ritual. Their case was that, when the first chapter of the Kuran was repeated, they were entitled at the conclusion of the chapter to say the word "*Amin*" aloud, and that they were also entitled to raise up their hands at certain periods of the service. The defend-

ants contended that the plaintiffs were not Muhammadans, strictly speaking, and that they so essentially differed from the followers of the School of Imam Abu Hanifi that they, the defendants, were entitled to exclude the plaintiffs from the mosque in question. The learned Subordinate Judge of Benares tried the suit. He came to the conclusion that the plaintiffs were Muhammadans and as Muhammadans they were entitled to use the mosque in question for devotional purposes. On appeal the learned District Judge of Benares, although finding that the plaintiffs were Sunni Muhammadans, dismissed their suit mainly upon two grounds, one being that the mosque in question had been, as found by him, used exclusively by the school of Muhammadans who followed Imam Hanifi. The other ground being that the plaintiffs, although Sunnis, were, by reason of some peculiarity in their tenets, not strictly in his opinion the followers of any one of the four Imams. It appears to me that the case raises two questions, the first being whether a mosque which is dedicated to God can be limited in its dedication to any particular school or sect of the Sunni persuasion of the Muhammadans. The second question being whether it is shown here that the plaintiffs are not in fact Muhammadans of the Sunni persuasion, although they may have some peculiar views as to the ritual. That they are believers in one God and believe that Muhammad is his prophet, there is no question.

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Now as to the first question, no authority has been brought to our notice to show that a mosque which has been dedicated to God can be appropriated exclusively to or by any particular sect or denomination of the Sunni Muhammadans, and without very strong authority for such a proposition, I for one could not find as a matter of law that there could be any such exclusive appropriation. As I understand, a mosque to be a mosque at all must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual. As I understand it, a mosque is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience.

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Now on the second point I have said that it has been found as a fact that the plaintiffs are Sunni Muhammadans, and in fact in some interlocutory proceedings before the case was heard, the point was not seriously contested. There is, as far as I can ascertain, no evidence that these persons are not strictly Muhammadans, although they may differ from the majority of the Sunni Muhammadans on particular points. No authority has been brought before us to show that these persons by reason of any views which they may entertain as to ritual, could be treated by any orthodox Muhammadans as persons other than followers of the prophet. For these reasons I think the appeal must succeed and the judgment and decree of the first Court must be restored,

I have only further to say that, although I have expressed my view of the law, I think it better that persons who differ in matters of ritual should have separate mosques, but this is not the question we have got to decide. It must be distinctly understood that I entertain no doubt that a Muhammadan would bring himself within the grasp of the criminal law who, not in the *bonâ fide* performance of his devotions, but *malâ fide* for purposes of disturbing others engaged in their devotions, makes any demonstration, oral or otherwise, in a mosque, and disturbance is the result. I am of opinion that the appeal must be allowed with costs and the decree of the first Court restored.

STRAIGHT, J.—I am of the same opinion as the learned Chief Justice with regard to the particular case that is now before us. I think it is unfortunate that the learned Judge of Benares disturbed the extremely sensible judgment which had been passed by the Subordinate Judge, Mr. Kashi Nath Biswas, and with which I entirely concur. It represents exactly the view that I take of the litigation. But I think it my duty, having been one of the Judges who took part in the Full Bench case of *Queen-Empress* v. *Ramzan* (1), to which my brother Mahmood has referred, to make one or two observations in reference to that ruling, in order that there may be no misunderstanding, so far as I am concerned, as to what my view

(1) I. L. R., 7 All. 161.

in that case was and what I held to be the law in such matters. The learned Chief Justice has expressed with no uncertain sound what his view is upon the question, and the view that he has enunciated is precisely the view that the Full Bench took in that case. In *Queen-Empress* v. *Ramzan* (1), the matter came before this Court as a case of criminal revision, and it was our duty, unless there were no facts found to justify the conclusions, to accept the findings of fact recorded by the lower Court. Whether the view that I took with regard to those findings was right or wrong, I need not discuss, but I held then, and I hold now, that, if a Muhammadan goes to a mosque, not with the object of honestly performing his own religious duties, but with the deliberate purpose and intention of disturbing the quiet devotions of others who are engaged in prayers in that mosque, and he acts in such a way that the necessary consequence is that the congregation is disturbed, he has brought himself within the meaning of s. 296 of the Indian Penal Code. As I have said, whether I was right or wrong in the view I took of the findings in the *Queen-Empress* v. *Ramzan* (1) I am not going to enquire. But I may say this much, that what I understood was found in that case was that Ramzan having gone into the mosque with the deliberate purpose and intention, not of performing his devotions as a Muhammadan, but for the purpose of creating disturbance and preventing other people from performing their prayers, bawled out the word "*Amin*" in a noisy and disorderly fashion, and a disturbance was the result of his conduct. I believe that subsequently when the case came back from the Magistrate, this was the conclusion at which the majority arrived. I agree that this appeal should be allowed with costs, and that, the learned Judge's decree being reversed, that of the Subordinate Judge should be restored.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I also concur.

MAHMOOD, J.—I should myself have been perfectly willing to say not more than two words in delivering my judgment in the case,

(1) I. L. R., 7 All. 461.

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namely, that I also concur in the judgment of the learned Chief Justice and the order which is to be made in the case. But, as my brother Straight has said that some of the questions which we have been called upon to consider yesterday and to-day are questions that do not require adjudication by a tribunal of law, I think it is necessary for me to state my reasons why the order passed by the learned Chief Justice and concurred in by my learned brethren is the only one which can be passed in the case.

In the present case the exact state of the pleadings and the defence to the action have been put very clearly by the learned Chief Justice in his statement of the case, and I wholly concur with him. In the case of *Queen-Empress* v. *Ramzan* (1), there is of course, as the report shows, enough indication that my judgment was not present before the Court, and that these very points not only of the Muhammadan ecclesiastical law but also the points of the criminal law were not before the Full Bench. Speaking of the case, I do not wish to refer to it further than by saying that, even as a question of criminal law, I stated the view held by Field, J., as to cases where the lawful act of any person may cause a breach of the peace. "It amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition" (2).

I am far from being able to concede what Pandit *Sundar Lal* endeavoured to represent, that the present plaintiffs are not Muhammadans at all. I should have expected that, considering the expression of my views in *Queen-Empress* v. *Ramzan* (1), and considering also the importance of the question, the learned gentlemen at the Bar would produce stronger authorities to shake the authority of the dissentient judgment in that case. But no such attempt was made. For the purposes of the case it is not necessary for me to consider the exact definition of the word Muhammadan. But I said enough in *Queen-Empress* v. *Ramzan* (1) to show that so long as a mosque is a mosque, that so long as the plaintiffs are persons who call

(1) I. L. R., 7 All. 461. (2) I. L. R., 7 All. 477

themselves Muhammadans and entitled to worship, there is absolutely no authority to say that any sect or any creed or any portion of the community can restrain others who claim to have the right which, to use the language of Muhammadan law, God and his Prophet gave them, from putting such right into exercise.

It is clear then that Pandit *Sundar Lal*, in his able argument and in the manner in which he has considered the case, has frankly given up the proposition that the plaintiffs are not Muhammadans, and that he no longer maintains the argument that the mosque to which the litigation relates is not a mosque in the full sense of the Muhammadan Ecclesiastical Law, which law this Bench is bound by the express terms of the statute to administer in such cases. And if it is true that the plaintiffs are Muhammadans, then there is no authority for saying that, because of the circumstance that those persons happen to annoy or disturb the peace of mind of the assembly, they are not to be entitled to worship in the mosque.

As to the question of pronouncing the word "*Amin*," I hold that the word "*Amin*" must be said at the end of the prayer ending with *Sura-i-Fatcha*. I hold also that it should be pronounced. I hold also that there is a difference as to the exact note in which it should be pronounced, and I hold that there is no authority to say at what note of the vocal octave the voice should emanate. There is no authority to say that the word "*Amin*" should be pronounced in one note or in another. Pandit *Sundar Lal* did not undertake to show that it was so. I can imagine the case of a man going to a mosque for the purpose of worshipping God, and in the honest exercise of his conscience pronouncing the word "*Amin*" in a voice which appears to one ear as loud and to another ear as low. There are some who think that the speaking of the word "*Amin*" aloud is required by devotional feeling and is necessary for their prayers. I hold therefore that there is no authority in the Muhammadan Ecclesiastical Law to limit the tone of voice in which the word "*Amin*" is to be pronounced; that so long as the plaintiffs appellants are Muhammadans, as we have found they are, so long

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they are entitled to enter a mosque and perform the worship and say the word "*Amin*" without anything to restrain their tone or note of the octave. But if the pronouncing of the word "*Amin*" results in the disturbance of peace, that of course will have to be dealt with under the cirminal law. But the matter remains that where the word "*Amin*" is pronounced aloud in the honest exercise of conscience that it should be so pronounced, there can be neither any offence under the criminal law nor any wrong in the civil law.

Appeal allowed.

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December 18.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

HIKMAT ALI (DEFENDANT) *v.* WALI-UN NISSA AND OTHERS (PLAINTIFFS) *

Partition, suit for—Claim for partition of share less than Rs 1,000 *in family property exceeding Rs.* 1,000—*Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 20—"*Subject matter in dispute*"—*Jurisdiction of Munsif—Decree for partition of defendants' shares inter se.*

In a suit instituted in the Court of a Munsif by a member of a Muhammadan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs. 1,000, and the value of the whole family property exceeded Rs 1,000. The lower appellate Court decreed partition not only of the plaintiff's share, but also of the shares of the defendants *inter se*, though such partition was not asked for.

Held that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871) was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Vydinatha* v. *Subramanaya* (1), *Kirty Churn Mitter* v *Aunath Nath Deb* (2), *Shaikh Khoorshed Hossein* v. *Nubbee Fatima* (3), and *Ram Chandra Narayan* v. *Narayan Mahadev* (4) distinguished.

Held also that the lower appellate Court had no jurisdiction to partition as amongst the defendants the residue of the property left after the partitioning off of the plaintiff's share.

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* Second Appeal No 1120 of 1887 from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 2nd May 1887, modifying a decree of Babu Baij Nath, Munsif of Agra, dated the 8th August 1885.

(1) I. L. R., 8 Mad. 235.
(2) I. L. R., 8 Calc. 757.
(3) I. L. R, 3 Calc 551.
(4) I. L. R, 11 Bom. 216.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid*, the Hon. Pandit *Ajudhia Nath*, Mr. *J. Simeon*, Babu *Gobind Prasad* and Maulvi *Ghulam Mujtaba*, for the respondents.

EDGE, C. J. and TYRRELL, J.—The plaintiff, who is a member of a Muhammadan family, brought her suit to have her share of the family property partitioned. The suit was brought in the Munsif's Court. The value of the whole family property exceeded Rs. 1,000. The value of her share as ascertained by the Court below was less than Rs. 1,000. The case went on appeal to the Subordinate Judge, who decreed partition not only of the plaintiff's share but of the shares of the defendants *inter se*. One of the defendants has brought this appeal from that decree. We are informed that all the defendants in the suit are not parties to this appeal; consequently the decree which we shall pass will not affect the rights of any defendant who is not a party to this appeal. We can only deal with the rights of those who are parties to this appeal. The first objection taken by the appellant was that this suit could not be maintained in the Munsif's Court. At the time when the suit was filed, Act VI of 1871 was in force. By s. 20 of that Act it was enacted that—"The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed one thousand rupees" Pandit *Sundar Lal* for the appellant contends that the subject-matter in dispute within the meaning of that section was the whole family property and not merely the share which the plaintiffs claimed to have partitioned off. Act VI of 1871 repeated and took the place of Act XVI of 1868. The thirteenth section of the earlier Act was as follows:—

"Munsifs are empowered to try all original suits cognizable by the Civil Courts of which the subject-matter does not exceed in amount or value rupees one thousand."

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Pandit *Sundar Lal* relied on four authorities. The first of those is the case of *Vydinatha* v. *Subramanya* (1). The question there turned on the construction of s. 12 of Act III of 1873. The material words of that section were :—

"The jurisdiction of a District Munsif extends to all like suits and proceedings, not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed two thousand five hundred rupees.

That section does not limit the subject-matter to the subject-matter in dispute as was done by s. 20 of Act VI of 1871. The Madras Act in this respect, although subsequent to Act VI of 1871, was, for some reasons into which we need not enquire, worded differently from Act VI of 1871, and followed the wording of Act XVI of 1868; consequently we cannot regard the Madras case as an authority on the construction of Act VI of 1871. The next case to which we were referred was that of *Kirty Churn Mitter* v. *Aunath Nath Deb* (2). The attention of Sir Richard Garth, Chief Justice, in that case apparently was more directed to the question as to what was the fee to be paid under the the Court Fees Act. He does not apparently seem to have considered the construction of s. 20 of Act VI of 1871. If the latter portion of his judgment bears the construction put on it, it appears to us to have been *obiter*.

The third case is that of *Shaikh Khoorshed Hossein* v. *Nubbee Fatima* (3). We may say with regard to that case that, should the question in that case arise, we would not be prepared to follow that decision. But the question here before us did not arise in that case. There is another case to which Pandit *Sundar Lal* referred in support of his argument that the whole property of the Muhammadan family must have been deemed to have been the subject-matter in dispute under the plaintiff's claim. That is the case of *Ramchandra Narayan* v. *Narayan Mahadev* (4). It is not necessary for us to consider whether, in a suit for partition framed differently to that before us, a decree could be passed partitioning the

(1) I. L. R., 8 Mad. 235.
(2) I. L. R., 8 Calc 757.
(3) I. L. R., 3 Calc. 551.
(4) I. L. R., 11 Bom. 216.

shares of the defendants *inter se* which might operate as *res judicata* in a subsequent suit. In this suit as we understand it, no partition amongst the defendants *inter se* was prayed for. In our opinion there is clearly a distinction between the subject-matter of the suit and the subject-matter in dispute. Such a distinction is to be seen in s. 596 of the Code of Civil Procedure. We are quite satisfied that the subject-matter in dispute in this suit was the share which the plaintiff asked to have partitioned, and that share, as we have said, did not exceed in value 1,000 rupees. In our opinion it makes no matter that the share in question was at the date of the suit a portion of a family property, which family property exceeded rupees 1,000 in value. We are consequently of opinion that the Munsif had jurisdiction to hear this suit. The next objection taken to the decree was that in the suit the Subordinate Judge had decreed specification and partition of the defendants' shares, which was not asked for in the suit. The parties did not consent to any such partition being made. We know of no authority which in such a case would give a Judge jurisdiction to partition, as amongst the defendants, the residue of the property left after the partitioning off of the plaintiff's share. We must vary the decree below so far as it affects the parties to this appeal, by setting aside that portion of the decree which decreed specification and partition of the shares amongst the defendants. The plaintiff has filed an objection as to the disallowing of her costs by the lower appellate Court. We see no reason to interfere with the discretion that was exercised in the lower appellate Court in that respect. As to the respondent Jaffar Husain, he was needlessly made a respondent to the appeal. The appellant must pay his costs of the appeal. As to costs as between the other parties, the parties respectively will bear their own costs. The decree is modified to the extent mentioned above.

Appeal allowed in part.

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December 19.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

RAMESHUR SINGH AND ANOTHER (PLAINTIFFS) *v.* SHEODIN SINGH AND ANOTHER (DEFENDANTS).

Civil Procedure Code, ss. 562, 564, 588 (28), 591—Remand in contravention of s. 564—Remand and all subsequent proceedings illegal—Omission to appeal from remand order—Objection to order allowed on appeal from final decree—Construction of statutes—Distinction between affirmative commands and negative prohibitions—Irregularities and illegalities.

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed,—*held* by the Full Bench that, with reference to ss. 562, 564 of the Civil Procedure Code, the lower appellate Court had no jurisdiction to remand the case under the former section, and that both the remand order and all proceedings subsequent thereto were *ultra vires* and illegal.

Held further that the legality of the remand order and the subsequent proceedings could, under s. 591 of the Code, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under s. 588 (28).

As a principle of the interpretation of statutes, a distinction must be drawn between cases in which a Court or an official omits to do something which a statute enacts shall be done, and cases in which a Court or an official does something which a statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and therefore without jurisdiction.

THIS appeal originally came before Mahmood, J., who ordered it to be laid before the Chief Justice with a view to the selection of a Bench for its disposal. A Bench consisting of Edge, C. J., Straight and Mahmood, JJ., was constituted accordingly, and they in turn ordered that the case should come before a Full Bench of five Judges.

The facts of the case are sufficiently stated in the judgment of Edge, C. J.

Munshi *Juala Prasad*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

EDGE, C. J.—The plaintiffs-appellants here brought the suit, out of which this second appeal has arisen, to have their right to

remain in possession of certain bighas of land declared, and alleged that their title had been obtained by a *sulehnama*. The defendants pleaded denying the right of the plaintiffs, and alleging that the *sulehnama* never took effect as against them and was not admissible in evidence, and that the plaintiffs had never been in possession of the land in dispute, and that their claim was barred by limitation. The Munsif framed the following issues :—

" (1.)—Are plaintiffs in possession of the land in dispute? Can they sue to be maintained in possession of the land in suit? (2) Can the *sulehnama* take effect as against the defendants? (3) Can the *sulehnama* be admitted in evidence? (4) Is the claim barred by limitation? "

Babu Nilmadhub, the then Munsif of Gházipur, took all the evidence which was tendered before him, and, on the evidence, found in favour of the plaintiffs on all the four issues, and gave them a decree.

On appeal, the then Subordinate Judge of Gházipur, on the 30th July 1884, being of opinion that the evidence was defective, and not agreeing with the Munsif in his conclusions as to some of the evidence which had been taken, set aside the decree of the Munsif and remanded the case under s. 562 of the Code of Civil Procedure, and directed that the following issues should be tried, namely, "(1) Were the appellants majors or minors at the time of the execution of the deed of compromise, in other words, how old were they actually at the time of the execution of the deed of compromise, and when the petition of plaint in the suit in which the compromise was effected was filed? "

" (2) Was that decree executed after the deed of compromise, and was possession taken of the numbers in suit in this case under the deed of compromise or not? "

Under that order of remand Babu Bipin Bihari Mukerji, who was then the Munsif of Gházipur, took further evidence and found as a fact that the defendants were minors at the date of the compromise, but notwithstanding that finding, he, taking much the same view

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of the other facts as had been taken by his predecessor, decreed the claim of the plaintiffs.

I may mention that his predecessor, Munsif Babu Nilmadhub, had not overlooked the question raised as to the minority of the defendants, but, having regard to the other facts found by him, had considered that the minority of the defendants at the time of the compromise did not afford a defence to the suit. The defendants again appealed, and the appeal came to be heard before the same Subordinate Judge who had made the order of remand. He, on the 15th July 1886, having considered the fresh evidence which was taken on the remand, allowed the appeal and passed a decree dismissing the plaintiffs' suit with costs. From that decree of the 15th July 1886 the plaintiffs have brought this appeal.

Mr. *Juala Prasad* for the appellants has contended that the Munsif Babu Nilmadhub had disposed of the suit upon the evidence which the parties had tendered before him, and had not "disposed of the suit upon a preliminary point so as to exclude any evidence of fact;" that under such circumstances the order of remand was, by reason of s. 564 of the Code of Civil Procedure, *ultra vires* and illegal; that the proceedings taken under that order of remand must be treated as null and void; that the further evidence taken on the remand should not have been considered by the Subordinate Judge; and that these points were under s. 591 of the Code of Civil Procedure open to the appellants in this appeal. He relied upon *Chheda Lal* v. *Badullah* (1), *Har Prasad* v. *Jafar Ali* (2), *Dhan Singh* v. *Basant Singh* (3), *Har Narain Singh* v. *Kharag Singh* (4), *Goodall* v. *The Mussoorie Bank, Limited* (5), my judgment in *Ganga Prasad* v *Jag Lal Rai* (6), *Banwari Lal* v. *Samman Lal* (7), *Mahesh Chandra Das* v. *Madhub Chandra Sirdar* (8), *Jatinga Valley Tea Company, Ld.* v., *Chera Tea Company, Ld.* (9), *Jarbhandan Singh* v. *Nakchhed Singh* (10), *Reasut Husain* v. *Hadjee Abdoollah* (11).

(1) I. L. R., 11 All., 35.
(2) I. L. R., 7 All., 345.
(3) I. L. R., 8 All., 519.
(4) I. L. R., 9 All., 447.
(5) I. L. R., 10 All., 97.
(6) I. L. R., 11 All., 333.
(7) I. L. R., 11 All., 488.
(8) 2 B L. R., Short Notes of Cases 13.
(9) I. L. R., 12 Cal. 45.
(10) Weekly Notes, 1887, p. 224.
(11) L. R., 3. I. A. 221.

On the other hand, Mr. *Madho Prasad* for the respondents contended that s. 591 did not apply; that the plaintiffs, not having appealed from the order of remand, and having taken part in the proceedings held under that order, were precluded from now questioning the validity of that order or the proceedings held thereunder; that the order of remand was properly made and was not *ultra vires*; and that, in any event, the case came within s. 578 of the Code.

Mr. *Madho Prasad* was unable to show that the Munsif, Babu Nilmadhub, had disposed of the suit upon any preliminary point, much less upon a preliminary point so as to exclude any evidence of fact, or even that the Munsif had excluded any evidence, oral or documentary, which had been tendered before him. Without expressing any opinion as to whether or not the Munsif, Babu Nilmadhub, drew the correct conclusions from the evidence before him, or correctly applied the law to the facts which he found, it appears to me that he did not omit to try any issue, or to determine any question, which was essential to the case as presented to him.

It is quite clear to my mind that the Munsif, Babu Nilmadhub, did not dispose of the case upon a preliminary point so as to exclude any evidence of fact.

If any material evidence was omitted to be taken, the omission was caused, not by any act of the Munsif, but by the neglect of the parties to tender such evidence when the case was before the Munsif. In fact the Munsif tried and decreed the suit on the merits. If the Subordinate Judge had no jurisdiction in this particular case to make the order of remand, or to consider the evidence taken upon the remand, the cases of *Jarbhandan Singh* v. *Nakchhed Singh* (1) and *Chheda Lal* v. *Badullah* (2) are direct authorities in this Court to show that the validity of the order of remand can be questioned in this appeal, and that the proceedings under such an order are null and void. I adhere to what I said in my judgment in *Chheda Lal* v. *Badullah* (2). In *Goodall* v. *The Mussoorie Bank, Ld.* (3), my brother Straight and my brother Brodhurst held that it was competent

(1) Weekly Notes, 1887, p. 224. (2) I. L. R., 11 All., 35.
(3) I. L. R., 10 All., 97.

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to a party aggrieved by an order made in execution proceedings to object in an appeal from a subsequent order enforcing execution against him, to the validity of the prior order on the ground that the Court had no jurisdiction to make such prior order. In that case the prior order was appealable and had not been appealed. At page 105 of the report, my brother Straight is reported to have said "I have no hesitation in holding that in an appeal of the kind before me, where the objection goes to the very root of the matter and to the authority of the Court to make the order, in the sense that it had no jurisdiction at all, I am entitled to entertain it, and if it has force, to give effect to it."

In *Har Narain Singh* v. *Kharag Singh*, (1) my brother Brodhurst and I held that an order adding a party as a respondent, which had not been appealed from, could be objected to on the appeal from the decree of the Court which had made the order.

Now as to the question whether or not the order of remand was *ultra vires*.

This was not a case coming within s. 562 of the Code. That in my opinion is beyond question. By s. 564 of the Code it is enacted that "the appellate Court shall not remand a case for a second decision, except as provided in s. 562."

S. 562 gives the jurisdiction to remand a case for a second decision, only if the Court whose decree is under appeal disposed of the suit upon a preliminary point, and then only if the disposal of the suit upon the preliminary point excluded evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties, and if the decree upon such preliminary point is reversed in appeal.

Looking at s. 562 by itself, that is apart from s. 564, the Subordinate Judge had no jurisdiction to make an order of remand in this case under that section, as the suit had not been disposed of upon a preliminary point so as to exclude any evidence of fact within the meaning of that section. In other words, on the case

(1) I. L. R., 9 All., 447.

before him, his jurisdiction to make an order under s. 562 did not arise.

S. 564 deprived him of jurisdiction to remand the case for a second decision under any section except s. 562, and indeed there is no other section in the Code which gave him jurisdiction to remand the case for a second decision. In *Banwari Lal* v. *Samman Lal* (1) my brother Straight and my brother Tyrrell held, and I think rightly, that an appellate Court has no power to remand a case under s. 562 of the Code unless the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point. In the case of *Jatinga Valley Tea Company, Ld.*, v. *Chera Tea Company, Ld.*, (2), the Munsif, under an order of remand under s. 562 of the Code, pending an appeal against the remand order, obeyed the order, reheard the case and passed a decree dismissing the suit. In delivering the judgment of the Court in that case Field, J., said :—

"It has been contended before us that this appeal ought not to be heard. It is said that after the remand order, the Munsif proceeded to make a final decree; and the existence of that decree is a bar to the hearing of this appeal against the order of remand. We are unable to concur in this contention. The law, sub-s. 28 of s. 588 of the Code of Civil Procedure, expressly gives an appeal against an order under s. 562 remanding a case. That provision is not in any way qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance, before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order was badly made, the decree, and indeed all the proceedings taken under that remand order, are null and void."

I agree with every word in the passage which I have just quoted. In that case the Calcutta High Court directed the lower appellate Court to determine the appeal from the first decree of the Munsif

(1) I. L. R., 11 All. 488. (2) I. L. R., 12 Calc. 45.

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upon the evidence on the record at the time when the appeal was preferred. In *Mahesh Chandra Das* v. *Madhab Chandra Sirdar* (1), which was a case of a remand under the corresponding section of Act VIII of 1859, Phear and Hobhouse, JJ., in their judgment after referring to ss. 352 and 354 of that Code, said :—

"Indeed, there does not seem to be the slightest ground for suggesting that the lower Court omitted to try any issue, or to determine any question of fact, which was essential to the merits of the suit. Again, had the lower (appellate) Court, for good reason, thought it necessary to have before it additional evidence, it might have taken the necessary steps under s. 355 of the Civil Procedure Code, for the purpose of procuring that evidence, provided that it at the same time recorded its reasons for requiring it. This again did not occur, and under no other circumstances than those to which I have referred, as we understand the Civil Procedure Code, could the lower appellate Court rightly direct that the parties to the suit should furnish evidence in addition to that which was already on the record. It seems to us, therefore, perfectly clear that the remand order of the lower appellate Court was not made in accordance with any of the provisions of the Civil Procedure Code, and indeed that it is one directly in opposition to the express terms of s. 352. It was therefore illegal and we are bound to direct that it be set aside. It follows that, inasmuch as the decision of the lower appellate Court, which has come to us on special appeal, was mainly founded upon the evidence which was produced under the remand order, the judgment of the lower appellate Court is bad and must be reversed."

In my opinion the case of *Reasut Husain* v. *Hadjee Abdullah* (2) has no bearing upon the question before us. That case turned upon the construction of the sections in Act VIII of 1859 relating to review.

The cases of *Har Prasad* v. *Jafar Ali* (3) and *Dhan Singh* v. *Basant Singh* (4) mainly related to the construction of s. 622 of the

(3) 2 B. L. R., Short Notes of Cases 13.
(4) L. R., 3 I A. 221.
(5) I. L. R., 7 All. 345.
(6) I. L. R., 8 All. 519.

Code of Civil Procedure. In those cases my brother Mahmood expounded his views as to the meaning of the term "jurisdiction."

In my opinion, there is a difference between a case in which a Court or an officer of a Court omits to do something which by a statute it is enacted shall be done, and cases in which a Court or an officer of a Court does something which by a statute it is enacted shall not be done. In the one case the omission to do an act which by the statute it is enacted shall be done, may not amount to more than an irregularity in procedure, whilst in the other case, in which the prohibition is enacted, the doing of the prohibited thing by the Court or the official is *ultra vires* and illegal, and if *ultra vires* or illegal, it must follow that it was done without jurisdiction.

In Mr. Leake's excellent Digest of the Law of Contracts, he, in discussing the effect of statutory prohibitions so far as contracts are concerned, says at pages 723-4:—

"The statute law expresses commands and prohibitions in written terms, upon the construction of which it is to be determined in each case whether a matter is so far illegal that it cannot be made the subject of an agreement. Acts of Parliament sometimes impose a penalty upon an act without an express prohibition; it is then held, as a general rule, that the penalty implies a prohibition, and an agreement involving such matter would be void for illegality. But Acts of Parliament sometimes impose a penalty or prohibition for a special or limited purpose only, as for the protection of the revenue or other immediate object, without intending any further or general prohibition, and an agreement may then be held valid, although a party to it may incur a penalty or commit an offence against the statute. In such cases the question whether the agreement be illegal depends upon the construction of the statute, as to the restricted or general operation of the prohibition; but if upon the true construction of the words of the statute the agreement be held to be illegal, the purpose of the Legislature, whether it be the protection of the revenue or any other subject, is immaterial. On the other hand, a matter may be declared unlawful by statute and therefore vitiate an agreement respect-

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ing it, although not attended with any penalty or specific punishment.

"A distinction has been sometimes attempted between *malum prohibitum* and *malum in se* in the effect of illegality upon an agreement, but it is said that 'no such distinction can be allowed in a Court of law; the Court is bound in the administration of the law to consider every act to be unlawful, which the law has prohibited to be done.'"

In *Bakhshi Nand Kishore* v. *Malak Chand* (1), Mr. Justice Oldfield and my brother Mahmood held that the selling of immoveable property in execution of a decree in contravention of the provisions of s. 290 of the Code, was an illegality which vitiated the sale, and that was the view which I held in *Ganga Prasad* v. *Jag Lal Rai* (2). It is true that my brother Brodhurst, in the case which I have last referred to, did not attach the same importance to the word of prohibition in s. 290 which I did, and treated the sale as not prohibited, and therefore illegal, but merely as irregular.

As I understand the judgment of my brother Mahmood, in *Jasoda* v. *Mathura Das* (3), he there receded somewhat from the construction of s. 290 of the Code which could alone have justified the judgment to which he was a party in *Bakhshi Nand Kishore* v. *Malak Chand* (1).

To refer to another section, now rejected, of the Code, which, in my opinion, contained a distinct prohibition, namely, s. 563, it could hardly be contended that a Court which in contravention of the prohibition in that section had taken evidence, was not acting *ultra vires*, or that evidence so taken, which the statute enacted should not be taken, could be treated by the Court of first instance or by a Court of appeal as evidence in the suit.

The jurisdiction of the subordinate Courts is created by statute and the power of those Courts to act in any particular case or manner cannot exist if the statute either does not confer on the Court jurisdiction to act in the matter, or says that the Court shall

(1) I. L. R., 7 All., 289. (2) I. L. R., 11 All. 333.
(3) I. L. R. 9 All. 511.

not act in the matter, or in the matter in a particular manner. I would not have gone at such length into the question before us, if it had not appeared to me that sometimes the distinction between words of prohibition and words of direction in statutes is lost sight of.

On authority and also on general principles, I am of opinion that on the true construction of ss. 562 and 564 of the Code of Civil Procedure, as those sections stood at the time when the order of remand was made, the Subordinate Judge in making the order of remand, assumed a jurisdiction which he did not possess, and acted *ultra vires* and illegally, and that this appeal should be allowed and the order of remand, all proceedings thereunder, and the decree of the Subordinate Judge should be set aside, and that the present Subordinate Judge of Ghâzipur be directed to restore the original appeal to his list of pending appeals, and to dispose of it according to law. I am also of opinion that the costs here and hitherto below should abide the event.

STRAIGHT, J.—I concur.

BRODHURST, J.—I concur.

TYRRELL, J.—I concur.

MAHMOOD, J.—The facts of the case have already been stated by the learned Chief Justice, as also the arguments which have been addressed to us on behalf of the parties. They seem to me to raise only three points for determination.

First: Whether, if the lower appellate Court's order of remand dated the 30th July 1884, purporting to have been passed under s. 562 of the Civil Procedure Code, was erroneous, the validity of such order can be questioned in this appeal, notwithstanding the circumstance that the order might have been appealed from under cl. 28 of s. 588 of the Code, but was not so appealed.

Secondly: Whether the order in question was justified by s. 562 read with s. 564 of the Code.

Thirdly: Whether in view of the circumstance that the order was carried out by the first Court, which took further evidence, and

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passed a fresh decree on the 30th March 1885, and the case again came up for adjudication by the lower appellate Court, which dealt with the case upon the merits by its judgment of the 15th July 1886, dismissing the suit, such error as may have existed in the order of remand of the 30th July 1884, is cured by the provisions of s. 578 read with s. 587 of the Code of Civil Procedure.

I think these are the points which require decision by the Full Bench, and upon the first of them I entirely agree in what the learned Chief Justice has said with reference to the provisions of s. 591 of the Code and the case-law upon the subject, that there can be no doubt that the validity of the lower appellate Court's remand order of the 30th July 1884 can be called into question even at this stage of an appeal from the final decree of that Court dated the 15th July 1886. This indeed is the effect not only of the statute itself, but of some anterior decisions of the Lords of the Privy Council on the subject. I also agree fully with the learned Chief Justice in holding, with reference to the proceedings of the parties and the circumstances of the case as to the existence and production of the evidence on the record when the remand order of the 30th July 1884 was made by the lower appellate Court, that that order was not required by s. 562 of the Code of Civil Procedure and was therefore made in contravention of the provisions of s. 564 of the Code, and this view answers the second question also.

Upon the third question I confess I entertained doubts at the hearing as to whether or not a distinction was to be drawn between erroneous orders of remand under s. 562, which orders go to the very root of the litigation, and erroneous orders which only involve practically the remand being made under s. 562 instead of s. 566 ending in the reception of further evidence which might either under remand made under s. 563 be received by the first Court or by the appellate Court under s. 568. The doubt was superinduced by the circumstance that in some cases this Court has declined to try an appeal from a remand order made under s. 562 and appealed from nder cl. 28 of s. 588 of the Code, upon the ground that the

remand order appealed from had in the meantime already been carried into effect and its validity might be questioned in the second appeal from the final decree of the lower appellate Court.

I think I must say, after what the learned Chief Justice has said in his judgment in this case, that such a practice was erroneous; and this leads me to the real difficulty in the case, namely, whether an infringement of the provisions of s. 561 of the Civil Procedure Code can be covered by s. 578 of that Code. I call it the real difficulty in the case, because it was argued that notwithstanding the negative terms in which that section has been framed, an infraction of the provisions of that section was not an illegality divesting jurisdiction or affecting the merits of the case, but a mere defect or irregularity of procedure such as would be covered and cured by s. 578 of the Code read with s. 537 of that enactment.

Upon this point also I agree with the learned Chief Justice. The recognized rules of interpreting statutes draw a distinction between affirmative terms however mandatory, whether such mandate is conveyed by the word "may" or by the word "shall," and negative terms prohibiting any particular thing to be done. As I understand the rules of interpretation, I hold that a vast distinction exists between these two classes of enacting clauses in statutes, and that whilst in cases of affirmative words even the word "shall" might be taken to be only directory as distinguished from imperative, in cases of negative words such as those which occur in s. 561 of the Code, the proper rule of interpretation is to take them as prohibitory, and as such, rendering illegal that which is done in contravention of such prohibition. I therefore agree with the learned Chief Justice in the interpretation which he has placed upon the prohibitive terms of s. 561 of the Code, occurring as the word "shall" occurs there with the negative word "not." I also agree with him in holding that by reason of the prohibitory character of the terms of the section the remand order passed by the learned Subordinate Judge of the lower appellate Court on the 30th July 1884 was illegal, and therefore the

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proceedings taken by the first Court in pursuance of the aforesaid illegal order were taken without jurisdiction within the broad interpretation which I placed upon that technical expression of law in *Dhan Singh* v. *Basant Singh* (1), and that therefore such proceedings necessitate the retrial of the case by the learned Judge of the lower appellate Court, which is the order made by the learned Chief Justice in this case, as they are not covered by s. 578 of the Code of Civil Procedure.

What I wish to add to what I have said consists of two propositions. The first of them is that with reference to the case to which the learned Chief Justice has referred in connection with the prohibitory terms of s. 290 of the Civil Procedure Code as to the limited time within which sales in execution of decrees would not take place, my difficulty really rested, not so much with the terms of the section itself, as with the question whether a sale, which under the section would be illegal *ipso facto* by reason of the prohibitiveness of the terms of the section, could be made the subject-matter of such an objection as that contemplated by the application mentioned in s 311 of the Code; but since the question does not arise here I need say nothing further. I wish also to say that, as to the prohibitiveness of negative words in the statute, I am so fully in concurrence with the view taken by the learned Chief Justice, that after having considered the case, I feel that if I had held otherwise, I should in dealing with the statute have been constrained to hold that negative terms of s. 13 of the Civil Procedure Code (which is only one of the many other sections with negative words implying prohibition) were only directory and their infringement covered by s. 578, where the suit having been tried notwithstanding the application of the rule of *res judicata*, the lower Court had arrived at conclusions upon the merits. I mention this section as only an illustration of how a statute, such as the Civil Procedure Code, where it employs negative terms of prohibition should be interpreted, and I have mentioned this as fully supporting what the learned Chief Justice has said as to the interpretation of such clauses.

(1) I. L. R., 8 All., 519.

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The other thing which I wish to mention, and I do so with the permission of the learned Chief Justice, is that I do not interpret the order which he has made in the case to preclude the learned Judge of the lower appellate Court, after the remand which we are making to him, from exercising such powers as he may possess and legally exercise under ss. 566 and 568 of the Civil Procedure Code.

For these reasons I agree fully in the order that has been made.

Cause remanded.

APPELLATE CIVIL.

1890. *January* 10.

Before Mr. Justice Straight and Mr. Justice Mahmood.

MANNU SINGH (PLAINTIFF) *v.* UMADAT PANDE AND OTHERS (DEFENDANTS). *

Suit for cancellation of instrument—Act I of 1877 *(Specific Relief Act), s.* 39—*Fiduciary relation—Gift to spiritual adviser—Undue influence—Burden of proof—Act I of* 1872 *(Evidence Act), s.* 111.

In a suit under s. 39 of the Specific Relief Act (I of 1877) for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a *Chatri* by caste, well advanced in years, and the defendant was his *guru* or spiritual adviser, a Brahman held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendan recite the holy book called Bhagwat. Almost immediately after execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud.

Held that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it, and the principle recognised by s. 111 of the Evidence Act (I of 1872), the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed. *Sital Prasad* v. *Parbhu Lal* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Juala Prasad* and Babu *Rajendro Nath Mukerji* for the appellant.

* First appeal No. 34 of 1889, from an order of Munshi Kulwant Prasad, Subordinate Judge of Azamgarh, dated the 30th January 1889.

(1) I. L. R., 10 All., 535.

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Babu *Bishan Chandra Moitro*, for the respondents.

STRAIGHT, J.—This first appeal relates to a suit instituted on the 23rd August 1888, in the Court of the Subordinate Judge of Azamgarh by the plaintiff, who is the appellant before us, against the defendants, five in number, the principal of whom is one Umadat Pande, a Brahman, the donee under an alleged deed of gift of 26th April 1888. The suit is not an ejectment suit, but is one to obtain the specific form of relief contemplated by s. 39 of the Specific Relief Act, and what the plaintiff asked was that an alleged deed of gift of 26th April 1888 should be set aside; in other words, that the Court should order the document to be delivered up and cancelled in the way contemplated by the section of the Act to which I have referred. The grounds upon which the plaintiff asked this relief I need not more particularly mention except to say that at the outset he questioned whether he had ever executed the alleged deed of gift at all, and next he went on to say that if he had, the document was "spurious and fictitious and it was not executed by him willingly and voluntarily." Now I am not dealing with the plaint as a Court of first instance, or possibly I might, if it had been first presented to me at the outset of the suit, have had something to say as to the form in which it was drawn up, and I might have thought greater particularity in the allegations of fraud necessary, but no objection was taken by the defendants to the form of the plaint, and the suit proceeded to trial upon it as it stood. Both the parties have given evidence in the cause, and upon that evidence the decision of the learned Subordinate Judge has been passed in favour of the defendants and against the plaintiff, which decision is the subject-matter of the appeal. The only plea that I think it necessary to consider for the purpose of deciding this case is the second plea, which is in the following terms: the decision is bad upon the ground that "the transaction set up by the respondent cannot be enforced and recognised by a Court."

Now what is the case, taking the facts as put forward on the part of the plaintiff on the one side and the defendants on the other? The plaintiff is a *Chatri* by caste. He is a man well advan-

ced in years; one who not unnaturally would be contemplating that death could not be very far distant. As with most Hindus, he necessarily attached great importance to and held in high reverence the ministrations of Brahmans, to which caste the principal defendant Umadat belongs. Umadat is a man of some 43 years of age, and it is obvious from the remarks of the learned Subordinate Judge that he is a person held in high consideration amongst the people of the locality in which he resides. Now the sole property of which the plaintiff was possessed in the month of April 1888, whether in the shape of unencumbered proprietorship or in the shape of an equity of redemption, was a two annas eight pies share in mauza Sidhanna Raghoram, pargana Deogaon, valued, according to the plaintiff, at Rs. 6,000 or, according to the defendant, Rs. 2,999, but subject to certain mortgage charges the precise amount of which is not clear. The document, cancelment of which is sought by the plaintiff, purports to have been executed by him upon the 26th April 1888, and having had an opportunity of examining the terms of the instrument, I do not think I can do better than to state them as they have been translated to us by the Reader of the Court.

"I, Mannu Singh, son of Sheozor Singh, deceased, caste *Chatri*, by occupation zamíndár, and being resident and zamíndár of mauza Sidhanna Raghoram, do hereby declare that, as I have become old and have no issue, nor is there any hope that I shall, therefore, with a view of securing benefit to my soul in the next world, having a month ago heard the recital from Sri Bhagwat by Umadat Pandit, caste Brahman, who is my *guru* or spiritual guide, I have given a two annas share and out of two annas *gultansi* right of Saran Singh, an eight pies share, in all, two annas eight pies share in mauza Sidanna Raghoram of which I, declarant, am in possession, and have made a present and a gift by *danpattr* to the aforesaid *guru* of the share aforesaid, and he will remain in possession and pay Government revenue, and defraying all usual expenses, derive benefit therefrom generation after generation. Now I have no kind of concern, and I will cause mutation of names and will bring forward no excuse. If on behalf of me there is any evasion, then

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the *guru* may himself by application make mutation of names on the document."

Now in this document, which has been found by the learned Subordinate Judge to have been in fact executed by the plaintiff, he states that the defendant is his spiritual guide or *guru*, and in the defendant's own statement of defence in the suit, he also has declared that he was the plaintiff's spiritual guide or *guru*, and according to the fourth paragraph of the statement of defence, the circumstances under which the deed of gift was made were as follows :—

"The plaintiff has heard him reciting the holy book called Bhagwat, and with the view of deriving benefit in the next world, the plaintiff having made eleemosynary gift (*shankalp*) of the property, willingly and voluntarily executed a deed of gift (*danpattr*), and had it registered, and since the time of the execution of the deed of gift, the defendant holds possession of the property by payment of the Government revenue."

So that taking the deed of gift itself and the terms used in it in conjunction with the statements made by the defendant himself, I have no doubt that the defendant was the *guru* or spiritual guide of the plaintiff, and that such was the relation held by him in regard to the plaintiff; moreover, I take the defendant's own statements as showing what were the circumstances under which the document was executed by the plaintiff in favour of the defendant. Now it is upon these materials that in my opinion the appeal ought to be decided, and I do not think it is necessary to diverge into other matters which are mentioned in the decision of the learned Subordinate Judge, though I have to make a few remarks as to the contention which has been raised before us to-day in regard to what appears in the learned Subordinate Judge's judgment upon the point as to how far possession is necessary to constitute a valid and binding gift under the Hindu law and how far, if it is, the principle or the rule of Hindu law has been abrogated by s. 123 of the Transfer of Property Act, or in other words, whether assuming in this case that there has been, as found by the learned Subordinate

Judge, no possession on the part of the defendant of the property the subject of gift, the defect would be cured by the provisions of s. 123 of the Transfer of Property Act. Our attention was called to the ruling of the Calcutta Court in *Dharmodas Das* v. *Nistarini Dasi* (1) also to *Harjivan Anandram* v. *Naran Haribhai* (2), *Vasudev Bhat* v. *Narayan Daji Damle* (3), *Dagai Dabee* v. *Mathura Nath Chattopadhya* (4), and last but not the least, to the decision of their Lordships of the Privy Council in *Kali Das Mullick* v. *Kanhya Lal Pandit* (5). Now from the view in which I am disposed to deal with the case I do not consider it necessary to enter into what is a complicated and difficult question, and upon which at this moment I am not altogether satisfied as to what is the correct view, whether for the purpose of making a good title in the donee under the terms of a gift, actual possession must be given to the donee in order to satisfy the requirements of the Hindu law. There is of course direct authority in the ruling in *Dharmodas Das* v. *Nistarini Dasi* (1) for the view that s. 123 of the Transfer of Property Act has so far overridden the Hindu law, and there are also expressions of opinion of their Lordships of the Privy Council in *Kali Das Mullick* v. *Kanhya Lal Pandit* (5) at page 232 which raise considerable doubt and difficulty as to the soundness of the principle that possession is absolutely necessary, but the exigencies of the case do not require that I should determine the question. It must therefore be understood that any conclusion at which I arrive in this case is not based on any determination of that question.

Reverting to the position occupied towards one another by the plaintiff and the defendant as they appear upon the materials before me, I have to say that I in no way depart from the principles that I very fully discussed, considered and adopted in *Sital Prasad* v. *Parbhu Lal* (6). My judgment in that case was one I took some pains to consider, and I endeavoured therein to state in as explicit language as I could what I believe to be the true rule that should

(1) I. L. R., 14 Calc. 446.
(2) 4 Bom. H. C. R. A. C. 31.
(3) I. L. R. 7 Bom. 131.
(4) I. L. R., 9 Calc. 854.
(5) L. R. 11 I. A. 218; I. L. R., 11 Calc. 121.
(6) I. L. R., 10 All. 535.

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govern cases of this description. At page 545 of the report I said :—" But what the Courts in this country will do, is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise."

Then at a later stage I say :—

"Where a fiduciary or *quasi* fiduciary relation had existed, Courts of equity have always placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb."

Now this principle is recognized in the law of evidence in this country which declares that "where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence." (S. 111, Evidence Act, I of 1872). Now applying this rule to the present case, what is the reasonable inference? The defendant was, as I have found him to be, upon the statement of the plaintiff himself in his deed of gift, and upon the defendant's statement, the *guru* or spiritual guide of the plaintiff, and without any other than the absurd reason given by the defendant, upon the 26th April 1888, the plaintiff was led to strip himself of all the property of which he was possessed and to hand it over to the defendant. Would any reasonable man in full possession of his senses and not under unusual influence of some kind or other do such a thing? If, instead of having been able to go about at the time when he made the deed of gift, the plaintiff had been confined to his bed by illness, what would have been the inference, or if that sickness had ended in death, what would have been the inference? I have no doubt that the rule I have indicated is a

sound one, for the purpose of protecting people who from their religious fanaticism or old age and infirmities are under the influence and control of others when they have been influenced into doing what they would not otherwise have done, by requiring that the person seeking to sustain the transaction should show that it was carried through in perfect good faith and in such a way as to show that it was the voluntary and spontaneous act of the party to be affected. Now it does not appear to me, reading the learned Subordinate Judge's judgment and giving full effect to the argument addressed on behalf of the respondent and to the evidence, that there was any proof before the Court below nor is there before us to show us that the transaction of the 26th April 1888 was one that by our decree we ought to sustain, and speaking for myself I am quite unable to uphold it, taking as I do the defendant's own evidence, which leaves on my mind the irresistible impression that the defendant did take advantage of his relation towards the plaintiff to lead him to do this most improvident act and one which he almost immediately after repudiated. But even if I do not put it so high, it seems to me that the defendant has wholly failed to discharge the burden of showing that the transaction was made without undue influence and in good faith. I hold that in the absence of proof of this kind, the gift to the defendant must be treated as invalid, and that the plaintiff is entitled to the relief he seeks. I therefore am of opinion that the learned Subordinate Judge was wrong in the view he took, and reversing his decree, I decree the appeal and the claim of the plaintiff, and I direct that a decree be prepared in favour of the plaintiff for the purpose of giving effect to his claim in accordance with s. 39 of the Specific Relief Act. The plaintiff will get his costs in all the Courts.

MAHMOOD, J.—I am of the same opinion and wish to add nothing beyond saying that I concur in the doctrine laid down by my brother Straight in *Sital Prasad* v. *Parbhu Lal* (1), so far as the ruling applies to the existence of fiduciary relationship between a priest or spiritual guide of persons in transactions with the latter,

(1) I. L. R., 10 All. 535.

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so that all the presumptions would be against the defendant in the case, and the decree passed by my learned brother is the only one that could be passed in the case.

Appeal allowed.

1890. *January* 27.

Before Mr. Justice Straight and Mr. Justice Mahmood.

SURTI (PLAINTIFF) v. NARAIN DAS (DEFENDANT).*

Hindu Law— Exclusion from inheritance—Idiocy—Madness.

The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied.

The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endued with the business capacity to manage their affairs properly. *Tirumamagal Ammal* v. *Ramasvami Ayyangar* (1) distinguished.

The facts of this case are stated in the judgment of Straight, J.

Pandit *Sundar Lal*, for the appellant.

Mr. *Dwarka Nath Banerji* and Maulvi *Zahur Husain*, for the respondent.

STRAIGHT, J.—This first appeal relates to a suit brought by the plaintiff-appellant before us against the defendant-respondent under the following circumstances. It appears that prior to the year 1879 a man of the name of Salig Ram carried on a very considerable business in the Agra district as a contractor. He had one son Mathu Lal, a wife of the name of Bibia, and a daughter of the name of Surti, the plaintiff-appellant before us. Mathu at an early age was married according to the ordinary course of things prevailing among Hindus, but his first wife died, and when he was entering upon early manhood he was married a second time to Musammat Narain Dai, the daughter of a respectable person of position in the Agra district, and she is the defendant to the present suit. Musammat Surti, the daughter of Salig Ram, was married to one Mallu Mal. On the 10th September 1879, Salig Ram died leaving

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* First appeal No. 111 of 1888 from a decree of Maulvi Saiyad Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 31st March 1888.

(1) 1 Mad. H. C. Rep., 214.

behind him a large quantity of immoveable and moveable property, the nature of which is set out in the details attached to the plaint. In the ordinary course, upon the death of Salig Ram, he being a separated Hindu and the sole owner of his property, his son Mathu Lal would have inherited, and there is no doubt that as a matter of fact, upon his father's death he was treated by his mother, Musammat Bibia, as his father's heir, as the proceedings in a certain certificate application made under Act XXXV of 1858, which was taken at the end of 1879 by Musammat Bibia, show.

It is also noticeable that Mallu Mal, the husband of Musammat Surti, the present plaintiff-appellant, was well aware of that proceeding that was so being taken; and I think the learned Subordinate Judge was right in adopting the view he did, that both Musammat Bibia the mother and Mallu Mal the brother-in-law of Mathu Lal must be regarded as having looked upon him as not at that time disqualified from his father's inheritance, because in that proceeding he was treated as, and upon the footing of, being his father's heir, and it was in the capacity of guardian for him as his father's heir that a certificate of guardianship was granted to Musammat Bibia. In the present case Musammat Surti comes in, and in her plaint she makes the following allegations, namely, that Mathu Lal her brother was a lunatic and insane and was born deaf and dumb and was so at the time of his father's death also, and that he could not therefore have inherited the estate of his deceased father Salig Ram. The plaint further says that Musammat Bibia owned and held the whole of the estate of the deceased Salig Ram so long as she lived. Upon this allegation that Musammat Bibia took the whole estate upon the death of Salig Ram, and that Mathu Lal never inherited at all, the plaintiff claims possession of the estate as the daughter of Salig Ram in preference to the defendant, the widow of her deceased brother. It is common ground that, if Mathu Lal was disqualified under the Hindu Law from inheritance, Musammat Bibia would upon the death of her husband Salig Ram take the estate; and that in succession to her the plaintiff would be entitled thereto. But if Mathu Lal was not disqualified, then he took as the heir of

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his father, and after him the defendant would take the estate of a widow of a separated Hindu. Consequently the whole of the plaintiff's case rested upon the allegation, supported by such proof as she was in a position to bring, that Mathu Lal in fact never did take and never could have taken the inheritance of his deceased father Salig Ram, because he was disqualified by reason of being a lunatic and insane, or born deaf and dumb. The allegations contained in the plaint were contradicted on the part of the defendant, and the first question that had to be determined was, and that was one of fact, was Mathu Lal, by reason of insanity or lunacy or being born deaf and dumb, disqualified from inheriting from his father according to Hindu Law? No doubt there are many passages in various works of authority on the Hindu Law and in the sources of those authorities, namely the Hindu Law itself, which declare that certain persons are to be disqualified from inheritance. As has been pointed out by Dr. Jolly in his Lectures upon the Law of Partition, Inheritance and Adoption, at pages 271 *et seq*, there is much controversy and question as to what is the binding category of the disqualifications, some of which are mentioned by some authors and others by others, but only a few by all. This case however, does not render it necessary for me to enter into those controverted views; and it is enough to say that the plaintiff must be tied down to the terms of her plaint, by which she in fact alleged that Mathu Lal was a "lunatic and insane and that he was born deaf and dumb," and that by reason of those circumstances he was disqualified. The question then raised is a pure question of fact, and the learned Subordinate Judge, who has very fully considered and discussed all the evidence produced in the case, came to the conclusion that it failed to establish either that Mathu Lal was a lunatic or insane from his birth or at the date of the death of his father Salig Ram, or that he was born deaf and dumb. In the course of the argument I put it to Mr. *Sundar Lal*, who appeared on the part of the plaintiff, whether the statements of Dr. Hilson, the Civil Surgeon of Agra, given in Court upon the 2nd August 1887, did not put his case in its strongest shape, and he very frankly

said that they did, and that they represented what the case of lunacy or insanity was that was set up on the part of the plaintiff, as showing that Mathu Lal was a disqualified person. It is clear to my mind upon reading Dr. Hilson's deposition that it affords material wholly inadequate for the purpose of throwing Mathu Lal into any category of persons who according to the Hindu Law would be disqualified from taking their inheritance. Apart from the unsatisfactory nature of Dr. Hilson's statements in the present suit, and I say unsatisfactory, because his deposition was only given from what he found in the certificate granted by him on the 27th November 1879, his statements themselves do not appear to me to show that Mathu Lal was other than a person not quite up to the ordinary standard of intelligence, and possibly not one in whose hands it would be quite safe or advantageous for his interests to leave the management of his own affairs. But that is not enough in my opinion, and it does not seem to me, when we are dealing with a rule of Hindu Law the enforcement of which is to exclude a person from inheritance, that we should adopt and enforce that rule of Hindu Law except upon the clearest and most satisfactory proof that the true requirements of the Hindu Law are satisfied. I do not think myself that when the Hindu Law speaks of "idiots and madmen" or "lunatics" that it contemplates persons merely of weak intellect, in the sense that they are not up to the ordinary standard of human intelligence or endued with the business capacity to manage their affairs properly or that it intended such persons to be cut out of the list of heirs and deprived of their inheritance. Mr. *Sundar Lal* referred us to a case reported in the Madras High Court Reports, Vol. I, page 214 (*Tirumamagal Ammal* v. *Ramasvami Ayyangar*); and he says that that ruling establishes the position that the reason for disqualifying is "the unfitness of a person for the ordinary intercourse of life." But the learned Pandit overlooked the fact that in that case the person was an admitted idiot, and all that the Court said was that the reason for disqualifying an idiot was his unfitness for the ordinary intercourse of life. But there is nothing in the evidence before us to show that this man Mathu Lal was insane and thereby unfit for the ordinary intercourse

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of life. On the contrary Lála Sakhan Lal, vakíl, High Court, and Government Pleader, who was instructed on behalf of Musammat Bibia in the certificate proceeding of 1879, distinctly said that in his opinion Mathu Lal was *not insane*, though "his powers of reasoning were somewhat weaker than those of an ordinary man." Mr. Sakhan Lal further entirely disposes of the allegation in the plaint that Mathu Lal was deaf and dumb from his birth, for he says that he "conversed with Mathu Lal on their way to Dr. Hilson's house;" and that Dr. Hilson asked questions and Mathu Lal replied to the remarks and questions that he made to him. I do not propose, because it does not appear to me necessary to do so, to travel through the evidence upon the one side and the other. I have carefully read the judgment of the learned Subordinate Judge and I think he has satisfactorily and properly dealt with that evidence. I may, however, remark as a striking proof that Mathu Lal was not what the plaintiff says he was, that there are the facts that he was married to one lady of respectable family, and that upon her death, he was married to another lady of similar position, a state of things most unlikely to have happened in the Hindu community had he been an idiot or lunatic, a fact sure to be well known, the fathers of those girls being well aware as they must have been of the consequence of his mental condition on his right by inheritance. It is also proved by the evidence that, down to the death of his father, Salig Ram, Mathu Lal was constantly associated with him in his business, and documents were produced which showed that he took an intelligent part in that business. Further, and there seems to be no contradiction of the fact asserted by the defendant, that he performed the thirteen days' ceremony connected with his father's obsequies.

I have very little doubt whatever that this suit originated with, and was promoted by Mathu Lal, the husband of the plaintiff, Surti, for the purpose of unfairly ousting the defendant, the widow of Mathu Lal, from the property to which at least she is entitled so long as she lives. I repeat that I agree with the view expressed as to the value of the evidence by the learned Subordinate Judge, and

I fully adopt his conclusions with regard to that evidence, and am satisfied that there was no proof before the Court below, nor before us, which would warrant us in holding that Mathu Lal was an idiot or "insane" or born deaf and dumb, or that he was an "idiot" or "insane" at the date of his father's death, and as such was disqualified from taking the inheritance. I dismiss the appeal with costs.

MAHMOOD, J.—I agree so completely with all that has fallen from my brother that I should not have desired to deliver a separate judgment except for the fact that Pandit *Sundar Lal*, in arguing the case for the appellant, insisted strongly upon the original Sanskrit words which are to be found in Mitakshara, chap. II, s. 1, verse 1, as words implying circumstances under which disinherison may take place under that system of law. One of these words was, as the learned pleader pointed out, the word *unmattaka*, which in the English translation before me is rendered as "mad one." The other was the word *jad*, which has been translated as meaning an "idiot."

My brother Straight has described how these terms "mad one" and "idiot," whether taken in the original Sanskrit or in the English language or in any other language, would if taken in their general and vague sense, produce disastrous results in the shape of bringing about the disinherison of persons whose birthright it is to inherit from their father. These two words, which the learned Pandit has himself pointed out, are the very best illustration of what my brother has said in his judgment, namely, that every presumption is to be taken against disinherison; and before doing so the greatest care should be taken in ascertaining what the real views of the framers of the law were, and what they intended should be done for the purpose of taking away the property from the son or any other person, as in this case the widow, who is *primâ facie* entitled to inherit from him. This word *unmattaka* occurs in Sir Monier Williams' Dictionary at page 159, and there the meaning given is 'insane,' 'mad,' 'drunk.' Now that word is connected with the earlier word *unmatta*, which means 'insane,' 'drunk,' 'mad,' 'intoxicated,' &c., and has many other significations. The

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word *unmattaka* must have therefore all the meanings which the word *unmatta* has, of which it is a derivative.

The other *jad* which occurs in the same work at page 336 has the following meanings: 'Cold,' 'frigid,' 'chilly,' 'stiff,' 'stunted.' 'paralysed,' 'motionless,' 'frantic,' 'senseless,' 'stupid,' 'idiotic,' 'irrational,' 'dumb,' 'stunning,' 'stupefying'; with many other significations besides. It is not my desire in delivering my judgment in this case to enter into any philological disquisition; but as the case was argued on the basis of the Sanskrit etymology of those words themselves, I have thought it desirable to show that these words are not to be taken in their literal sense in the law. Otherwise a man who takes a cold bath in the morning may get a 'chill,' and thus find himself suddenly prevented from inheriting from his father.

Consequently, in dealing with these general and vague phrases and terms such as *unmattaka* and *jad*, one must not be guided merely by their philological signification, but must be satisfied as to what the lawgivers who used those terms themselves understood.

In this case the strongest evidence in favour of the plaintiff is that of Dr. Hilson, whose opinion proceeds upon a certificate of his own granted in the year 1879 and who perhaps had only a very few minutes' leisure on two different occasions to judge as to the mental capacity of Mathu Lal; and therefore his whole evidence proves nothing more than a mere *suspicion* that there may have been a congenital idiotcy or weakness of mind. But that is not sufficient in my opinion to prove that it was so either at the birth of Mathu Lal or the death of Saligram on the 10th September 1879. The views therefore expressed by my brother represent not only sound common sense, but also the views of those who made those laws relating to the exclusion from inheritance of a Hindu.

I therefore entirely agree in the whole judgment which my brother has given and also in the decree which he has made.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr Justice Brodhurst.

1890
January 29.

BALLAM DAS (JUDGMENT-DEBTOR) *v.* AMAR RAJ AND ANOTHER (DECREE-HOLDERS.)*

Mortgage—Second mortgage of the same property to the same person—Sale in execution of decree on first mortgage—Purchase by mortgagee decree holder.

A decree-holder holding two decrees of different Courts on separate bonds hypothecating the same property, in execution of the first decree purchased the property himself. The surplus of the sale proceeds was distributed by the Court among other persons who held money decrees against the same judgment-debtor.

Held that the decree-holder could not afterwards execute the second decree against property of the judgment-debtor not included in the hypothecation bond. *Ahmad Wali* v. *Bakar Husain* (1), *Khwajah Bakhsh* v. *Imamap* (2), and *Bapu Ravji* v. *Ramji Svarupji* (3) referred to.

THE facts of this case were as follows. One Ballam Das was a simple mortgagee under two bonds relating to the same property. He brought two suits for enforcement of the bonds, one suit being instituted in the Court of the Subordinate Judge and the other in the Court of the Munsif of Benares. He obtained a decree in each suit, and in execution of each decree the mortgaged property was attached. On the 9th June 1885, the property was sold in execution of the decree passed by the Subordinate Judge, and was purchased by the decreeholder himself. The amount realized by the sale was Rs. 4,500, the decree of the Subordinate Judge being for Rs. 3,585-14. The decree-holder then applied to the Munsif, in whose Court execution of the other decree (which was for Rs. 82-6) was pending to have the surplus of the sale-proceeds applied in satisfaction of that decree, and the Munsif forwarded the application to the Subordinate Judge, who, however, distributed the surplus among the holders of other decrees (for money only) against the judgment-debtor.

* Second appeal No. 1385 of 1888 from a decree of C. Donovan, Esq., District Judge of Benares, dated the 4th August 1888, reversing a decree of Pandit Raj Nath, Munsif of Benares, dated the 24th April 1888.

(1) Weekly Notes, 1883, page 61. (2) Weekly Notes 1885, page 210.
(3) I. L. R. 11 Bom. 112.

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The decree-holder then applied for execution of the Munsif's decree by sale of property belonging to the judgment-debtor other than that hypothecated.

The Munsif dismissed the application, on the authority of *Babu Ravji* v. *Ramji Svarupji* (1).

On appeal by the decree-holder, the District Judge of Benares reversed the Munsif's decree, and allowed the application. The judgment-debtor appealed to the High Court, and the appeal came for hearing before Mahmood, J., who referred it to a Division Bench. His Lordship described the case as raising the following question :—

"Whether a person holding two incumbrances against one and the same property, and by bringing to sale the incumbered property in enforcement of the first incumbrance, and purchasing it himself, can, subsequent to such purchase, either claim enforcement of the later lien, or sue for recovery of money due upon such later lien by enforcement against some property of the judgment-debtor other than that which the incumbrancer has already purchased in execution of the decree which enforced his prior deed."

Pandit *Sundar Lal*, for the appellant.

Munshi *Nawal Behari Bajpai*, for the respondent.

EDGE, C. J. and BRODHURST, J.—The respondent here held two bonds in which the same property was hypothecated. In the Court of the Subordinate Judge he obtained a decree on one bond, in the Court of the Munsif he obtained a decree on the other. Each decree decreed the sale of the same property. The respondent attached the property under each decree, and, having done so, put it up to sale under the decree of the Subordinate Judge and himself purchased it at the sale. The proceeds of that sale satisfied the decree under which the property was sold, and left a surplus which the Judge directed to be made over to other parties. The respondent now seeks to execute the decree of the Munsif against the other property of his debtor which was not hypothecated. It

(1) I. L. R. 11 Bom. 112.

appears to us that this case comes within the principle of *Ahmad Wali* v. *Bakar Husain* (1), and also within that of *Khwaja Bakhsh* v. *Imaman* (2), and within that of *Babu Rajvi* v. *Ramji Svarupji* (3). The lower appellate Court in appeal made the order which the respondent sought. Applying the cases which we have cited, we must allow this appeal with costs, and reinstate the decree of the Munsif.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1890
January 30.

RAM LAL AND ANOTHER (DECREE-HOLDERS) *v.* NARAIN AND OTHERS (JUDGMENT-DEBTORS).*

Mortgage – Execution of decree—Conditional decree for sale not made absolute—Act IV of 1882 *(Transfer of Property), ss.* 88, 89—*Res judicata.*

A conditional decree for the sale of mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882) cannot be executed unless and until it is made absolute by an order passed under s. 89.

Where on a previous application being made for execution of such a conditional decree, the judgment-debtor did not appear to oppose the decree-holder's application for attachment and sale, but the application was dismissed for want of prosecution, —*held* that as the question whether the conditional decree was capable of execution before it was made absolute was never before in issue, and was not judicially treated on the occasion of the former application, there was no *res judicata* on the point.

THE appellants in this case held a decree against the respondents passed on the 24th November 1885, upon a bond dated the 15th June 1869. The decree was a conditional decree for sale of property mortgaged in the bond; it was passed under s. 88 of the Transfer of Property Act (IV of 1882); and it was in the form prescribed by sch. iv, No. 128 of the Civil Procedure Code. No order absolute for sale under s. 89 of the Transfer of Property Act was ever made or applied for. On the 26th April 1887, the decree-holders applied for execution of the conditional decree of the 24th November 1885, and the mortgaged property was attached, but the application was, on the 9th June 1887, struck off for want of prosecution. The pre-

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* Second appeal No. 512 of 1889 from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 27th February 1889, reversing a decree of Munshi Prag Das, Munsif of Agra, dated the 29th September 1889.

(1) Weekly Notes 1883, p. 61. (2) Weekly Notes 1885, p. 210.
(3) I. L. R. 11 Bom. 112.

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sent application for execution of the same decree was made on the 7th January 1888. Objection was taken on behalf of the judgment-debtors to the effect that the conditional decree of the 24th November 1885, was incapable of execution, and that the property could not be sold except under an order absolute for sale under s. 89 of the Transfer of Property Act, which had never been passed.

The Court of first instance (Munsif of Agra) disallowed the objection and granted the application for execution. The Munsif observed :—"As the property was attached before, and notice issued, but the judgment-debtors took no objection, and as I also find that according to the practice prevailing in the civil Courts of this district a final decree was not prepared before, therefore the objection of the judgment-debtors as to the correctness of the decree is untenable."

The judgment-debtors appealed to the District Judge of Agra. The Judge decreed the appeal, observing as follows :—

"The Munsif in his judgment has apparently laid stress on the fact that a wholly irregular course of practice was prevalent here, until stopped by an order, omitting to make conditional decrees absolute, and taking out execution on the conditional decrees, which were no decrees at all. He finds that the practice is deserving of indulgence. In this I cannot agree with him. Nor do I think it necessary to go at length into the question of whether it was necessary that objection should be taken to the first application, and whether *res judicata* applies. I simply find that, there never having been any decree in existence capable of execution, execution naturally cannot be taken out, and, holding this, I decree the appeal with costs against the respondents."

The decree-holders appealed to the High Court.

Babu *Dwarka Nath Banerji*, for the appellants.

Babu *Durga Charan Bonerji* and Munshi *Ram Prasad*, for the respondents.

BRODHURST and TYRRELL, JJ.—This is an appeal in the execution department. The appellants obtained a decree under s. 88 of the Transfer of Property Act on the 24th November 1888. They

never made any application under s. 89 to have that decree made absolute, and they have now in January 1888, taken out execution of the original decree. The Court below has held that the present decree is not capable of execution, and that an application on the part of the decree-holders to have the decree made absolute would now be barred by time. In second appeal two pleas are urged on behalf of the decree-holders. First that the order made by the Court executing the decree in April 1887, was equivalent to an order making the decree absolute. But, looking at the proceeding, it is obvious that this is not so. Secondly, it was contended that this question is *res judicata* between the parties; because when notice was issued to the judgment-debtors in April 1887, they did not appear to oppose the decree-holder's application for attachment and sale, but as the question was never before in issue, and was not judicially treated in 1887, or subsequently till the present application was made, it is plain that there has been no adjudication on the point which can bar the decision of the objection now taken. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

1890
January 30.

BABU RAM AND ANOTHER (PLAINTIFFS) *v.* RAM DAYAL, AND ANOTHER (DEFENDANTS.)*

Principal and agent—Suit by principal against agent to recover money received and not accounted for—Act XV of 1877 *(Limitation Act) sch.* ii, *No.* 89—*Termination of agency—Act IX of* 1872 *(Contract Act), ss.* 201, 218.

Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to ss. 201 and 218 of the Contract Act (IX of 1872) until he has paid the price to the principal; and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of sch. ii, art, 89 of the Limitation Act (XV of 1877): and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendant's breach of duty.

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* Second appeal No. 400, of 1888 from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 15th December 1887, confirming a decree of Munshi Prag Das, Munsif of Agra, dated the 10th September 1887.

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THE facts of this case were as follows. The plaintiffs were merchants trading at Agra, and they consigned, at different dates in 1881, 152 bags of *jeera* or cummin seed to the defendants, who were the plaintiffs' agents in Calcutta, on commission sale. On the 8th December 1881, the defendants sent to the plaintiffs an account of 119 out of the 152 bags. No account was ever rendered of the remaining 33 bags, which were sold in January 1882, and the plaintiffs made no inquiry and took no action regarding these bags until the 27th December 1886, when they demanded from the defendants the price realized on sale of the 33 bags, the demand being refused. The present suit was instituted in March 1887. The plaintiffs alleged in their plaint that the defendants had neither returned the *jeera* seed nor remitted the value thereof, and they claimed Rs. 543-3-9 as the price realized on the sale of the 33 bags. The defendants pleaded, *inter alia*, that the suit was barred by limitation.

The Court of first instance (Munsif of Agra) dealing with this plea, observed :—"I find that this suit is governed by articles 88 and 89 of Act XV of 1877. It is admitted by the parties that no account was ever demanded and refused. It remains to be determined whether the agency has terminated, and if so, whether this suit was filed within three years from the date of termination of the agency. Under s. 201 of the Indian Contract Act of 1872, "agency is terminated by the principal revoking his authority or the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind, or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors." In this case the authority of the principal was never revoked, the principal and agents are alive and of sound mind, and the principal has not been declared an insolvent under any such Act as referred to in this section. It is to be seen whether the business for which the agency was created has been completed. In this case the agency was created for the sale of merchandize or goods sent to the agent

by the principal. The principal, that is the plaintiffs, as would appear from the petition of plaint, consigned some 152 bags of *jeera* to the agents, the defendants, in Calcutta, to be sold by them between Chait Sudi 15th Sambat 1938 and Baisakh Badi 15 Sambat 1938. The agents sold 119 bags and credited the value to the plaintiffs' account. The remaining 33 bags were not accounted for. After the said consignment of 152 bags, no other goods were sent to the defendants for sale. The defendants sent an account of the plaintiffs on the 15th Baisakh Sudi Sambat 1938, *i.e.*, 8th December 1881. After this, the plaintiffs never demanded any account whatever of the remaining 33 bags. The defendants sold their 33 bags of *jeera* somewhere in January 1882, but they neither informed the plaintiffs of the sale nor submitted any account, nor paid the value thereof to them. The plaintiffs also remained silent up to the 27th December 1886, when they demanded the price of the said 33 bags of *jeera*, and the defendants refused to pay them. From the circumstances stated above, it is clear that the business of the agency terminated or was completed when the goods for the sale whereof it was created were sold, namely, Magh Sudí 2nd Sambat 1938. In my opinion it is not necessary for the completion of the business of the agency for such purposes that the price of the goods sold be paid to the principal. The contention of the learned counsel for the plaintiffs that, as the plaintiffs were not informed of the sale of the goods, in other words, had no knowledge of the sale, no cause of action accrued to them, and therefore limitation could not run from the date of sale, has no force. This is not the case in which, according to the Indian Limitation Act, a plaintiff's ignorance of the occurrence of the breach affects the starting point of limitation. I may add here that there is no allegation of fraud in the petition of plaint, or anywhere in the records of this case. Had there been such an allegation, the case might have been different. The present suit has not been brought within three years from the date of termination of the agency, *i.e.*, Magh Sudi 2nd Sambat 1938, when the goods were sold. The suit is therefore barred by limitation."

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The plaintiffs appealed to the District Judge of Agra, the material portion of whose judgment was as follows:—

"The appellants contend that it is not the duty of a principal to look after his agent, but for the agent to submit accounts to his principal, and that the cause of action does not accrue from the date of sale, but from the date when the plaintiffs became aware of it. In 1882 the respondents obtained a decree against the appellants in Calcutta for Rs. 600. This was executed in 1884, and the plaintiffs (appellants) admit that they then became aware that the 33 bags had been sold, in spite of which they admit they never called for any accounts or took any action till 1887. For the respondents it is urged that s. 213 of the Contract Act applies, *viz.*, that the agent is bound to render proper accounts to his principal on demand. In the Court's opinion, the appellants showed wilful and incomprehensible carelessness in not demanding the account of these 33 bags for six years, and are not entitled to plead ignorance when they took none of the legitimate means open to them to learn, by applying for accounts, what had become of these bags. The Court holds that art. 89, sch. ii, Limitation Act, XV of 1877, fully applies to this case, and that the plaintiffs are time-barred. The Court therefore dismisses the appeal with costs against the appellants."

The plaintiffs presented a second appeal to the High Court.

The Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal*, and Munshi *Nawal Behari Bajpai*, for the appellants.

Mr. *C. Dillon* and Mr. *R. Malcomson*, for the respondent.

BRODHURST and TYRRELL, JJ.—This suit has been erroneously dismissed as barred by limitation by both the Courts below. The plaintiffs are merchants who employed the defendants as brokers for the sale of certain goods, the defendants being bound on the sale of the goods to remit the prices realized to the plaintiffs. The plaintiffs alleged that the defendants furnished an account and sent certain moneys, but kept them out of the account, and did not remit the price of some *jeera* seed, which is claimed in this action. The defendants' main answer was that they had the plaintiffs'

authority for writing the debt off against debts due to them by the plaintiffs. The Court below has dismissed the suit under art. 89 of the Limitation Act; apparently the learned Judge's reasons were that the agency had determined within the meaning of s. 201 of the Contract Act more than three years before this suit was brought, and because the plaintiffs showed carelessness in not demanding the account of 33 bags for six years, and are not entitled to plead ignorance when they took none of the legitimate steps open to them. The learned Judge thought that the termination of the agency was to be ascertained and to run from the time of the plaintiffs' knowledge of the defendants' breach of duty, but that has nothing to do with the termination of an agency under art. 89 of the Limitation Act. The *terminus a quo* of that article is "when the account is during the continuance of the agency demanded and refused, or where no such demand is made, when the agency terminates." There is no question of knowledge or carefulness involved in this article. Now the Court of first instance found that on or about December 1886, the plaintiffs demanded an account of the price of these 33 bags and the defendant refused to pay, that was some six months before the suit was brought. Then arises the question whether these accounts were demanded and refused during the agency or not. It was argued with much ingenuity that under s. 201 of the Contract Act the agency had terminated immediately on the sale of the goods by the business of the agency being completed. But s. 218 of the same statute provides that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipt of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them. Moreover there was no allegation that their business relation had terminated when the action was brought in the Court below, and there was no justification in law or in fact for holding that the agency terminated as soon as the defendants sold the property. Applying therefore art. 89 of the Limitation Act, the suit is not barred, and the case must go back to the Court of first instance, and the costs will abide the result.

Cause remanded.

1890
February 4.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

MITTHU LAL AND OTHERS (DEFENDANTS) *v.* KISHAN LAL (PLAINTIFF.)*

Execution of decree—Distribution of proceeds of execution-sale – Sale in execution of decree enforcing mortgage—Priority of mortgages—Civil Procedure Code, s. 295, *proviso* (*c*)—*Act IV of* 1882 (*Transfer of Property*) *Act, s.* 80.

A mortgaged certain property to B in July 1874, to C in March 1877, and again to B in November 1877. B obtained a decree directing the sale of the property in satisfaction of his two mortgages, and it was sold accordingly. Subsequent to the sale, C obtained a similar decree upon his mortgage, and having unsuccessfully applied in his own suit to have his decree satisfied out of the sale proceeds after payment of B's first mortgage of July 1874, brought a suit under the last paragraph but one of s. 295 of the Civil Procedure Code to recover the amount received by B in respect of B's mortgage of November 1877.

Held that to read the words "an incumbrance" in s. 295, proviso (*c*) of the Civil Procedure Code as "an incumbrance or incumbrances", so as to give priority to B's mortgage of November 1877, over C's earlier mortgage of March 1877, would be to defeat the intention of the Legislature as expressed in that section and also in s. 80 of the Transfer of Property Act (IV of 1882); and that C was entitled to maintain the suit.

THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

Mr. *Dwarka Nath Banerji*, for the respondent.

EDGE, C. J. and BRODHURST, J.—There is no dispute about the facts in this case. One Narain Singh on the 8th July, 1874, mortgaged certain property to Ram Lal. On the 23rd November 1877, he further mortgaged the same property to Ram Lal. On the 7th March 1877, he had mortgaged the same property to Kishan Lal, who is plaintiff in this suit. Ram Lal obtained a decree on the 31st August 1883, for the amounts due under his mortgages of the 8th July 1874, and the 23rd November 1877. That decree directed a sale. On the 20th June 1885, the property was sold in execution of that decree. That sale was confirmed on the 26th June 1886. Kishan Lal had obtained a decree for sale of the same property on the 28th

* Second appeal No. 437 of 1888 from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 6th March 1888, reversing a decree of Maulvi Muhammad Ezid Bakhsh, Munsif of Kasganj, dated the 19th March 1887.

September 1885. Kishan Lal applied in his own suit to have his decree satisfied out of the proceeds of the sale under Ram Lal's decree after payment of Ram Lal's first incumbrance. The proceeds were handed over to Ram Lal in discharge of the mortgage of the 8th July 1874, and that of the 23rd November 1877. Of what remained there was not sufficient to discharge Kishan Lal's mortgage. Kishan Lal brought this suit against the representatives of Ram Lal to recover the amount which had been received in respect of the mortgage of the 23rd November 1877, on the ground that as his mortgage had not been satisfied, they, the representatives, were persons not entitled within the meaning of s. 295 of the Code of Civil Procedure to receive that amount. The first Court dismissed the claim. The Subordinate Judge on appeal gave the plaintiff a decree. The defendants, representatives of Ram Lal, have appealed.

Pandit *Ajudhia Nath* contended that under s. 295 clause (*c*) the representatives of Ram Lal took priority in distribution of the proceeds not only in respect of the money under the mortgage of the 8th July 1874, but in respect of the moneys due under the mortgage of the 23rd November 1877, over Kishan Lal, plaintiff. That contention is based on what appears to us to be a misreading of clause (*c*). The Pandit contends that the words "when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon" mean either incumbrance or incumbrances, and that as the property was sold under a decree ordering its sale for discharge of those two incumbrances, they took priority over Kishan Lal's incumbrance. To so read that section and to so apply it to a case like this would be in our opinion to frustrate the object the Legislature had in view not only in s. 295 of the Code of Civil Procedure, but in s. 80 of the Transfer of Property Act, and would be to apply a principle to the distribution of proceeds which would give priority to a subsequent incumbrance. Indeed, if the Pandit is correct, Kishan Lal would not be a person entitled to share in any distribution in this case, because his incumbrance instead of being subject to that of the 23rd November 1877,

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was prior to it, and if we were to treat that incumbrance of the 23rd November 1877, as in this case the incumbrance within the meaning of clause (c) for the discharge of which the sale was ordered, Kishan Lal would not come within the third category of distribution, nor would he come under the fourth, for his decree was a decree for enforcement of a lien and not a decree for money within the meaning of that clause. Under the circumstances of the case the Subordinate Judge was right, and the plaintiff is entitled to maintain the suit. We dismiss the appeal with costs.

Appeal dismissed.

1890. *March* 13.

Before Sir John Edge Kt. Chief Justice and Mr. Justice Brodhurst.

SALIG RAM AND ANOTHER (DEFENDANTS) *v.* HAR CHARAN LAL AND ANOTHER (PLAINTIFFS.)*

Mortgage—First and second mortgages—Purchase of mortgaged property by first mortgagee—Suit by second mortgagee for sale—Plaint denying or ignoring title of first mortgagee—Suit to be dismissed.

Where a second mortgagee coming into Court and, denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee. *Raghunath Prasad* v. *Jurawan Rai* (1) referred to.

THE facts of this case are stated in the judgment of the Court.

Mr. *G. T. Spankie*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

EDGE, C. J., and BRODHURST, J.—In this case the plaintiffs brought a suit for enforcement of a hypothecation bond by sale of the property mentioned in the bond. In their plaint they alleged that the defendants 4 and 5 were in possession of a shop, portion of the property, under a sale-deed, subsequent to the plaintiff's mortgage, which sale-deed, the plaintiffs alleged, had been collusively obtained. They in fact denied that the defendants 4 and 5 had any right to resist their claim to bring the whole property to

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* Second appeal No. 644 of 1888 from a decree of Munshi Lalta Prasad, Subordinate Judge of Gházipur; dated the 30th January 1888, confirming a decree of Babu Bepin Behari Mukerji, Munsif of Gházipur, dated the 27th July 1887.

(1) I. L. R., 8 All., 105.

sale. When the facts were investigated, it turned out that the defendants 4 and 5 stood in the position of mortgagees holding in priority to the plaintiffs, and that the sale to these mortgagees was a good sale. The defendants 4 and 5 were entitled to call in aid for their protection their prior mortgage. In the sale-deed that prior mortgage was referred to, so that the plaintiffs, who had ascertained in the registry the fact that the sale-deed had been executed, could, if they had chosen, have ascertained the facts as to the prior mortgage which was made in favour of the defendants 4 and 5. As we have said, the plaintiffs' suit ignored any right in the defendants 4 and 5, and in effect asked for a sale of the property free from any claim of the defendants 4 and 5. The plaintiffs obtained a decree for sale, that decree providing that, as to the shop, the auction-purchaser would take subject to the prior mortgage of the defendants 4 and 5. The defendants 4 and 5 have brought this second appeal.

The first thing to be noticed is that the plaint does not contain a true statement of the circumstances constituting the cause of action; the next thing to be observed is that the circumstances stated in the claim did not entitle the plaintiffs to the limited decree which they got. What we mean is that if the circumstances stated in the claim were true and were all the circumstances affecting the rights of the parties in this case, the plaintiffs would have been entitled to a clean decree for the sale, and not to the limited decree which they got. Now, in our judgment, where a second mortgagee coming into Court, and denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the only way to deal with this suit is to dismiss it, for it is a suit brought, either on a false statement of facts, or upon a suppression of material facts. We have been referred to a Full Bench judgment of this Court in *Raghunath Prasad* v. *Jurawan Rai* (1). In that case the attention of the learned Judges does not appear to have been drawn to the nature of the statements which were made in the plaint, if the statements in the plaint in that case were similar to those in the plaint in this case. What the Judges

(1) I. L. R., 8 All. 105

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did there was to insert into the decree below words of limitation reserving the rights of the prior mortgagee; whether they were asked to do more than that we do not know. In this case the appeal of the defendants 4 and 5 is allowed with costs, and the suit so far as they and this property are concerned is dismissed with costs in all Courts. The costs will be in proportion to the interests of the defendants 4 and 5.

Decree modified.

APPELLATE CRIMINAL.

1890 *June 20.*

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* PAYAG SINGH.

Act XLV of 1860 (Penal Code) s. 154—Liability of owner or occupier of land on which an unlawful assembly is held.

It is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that he should be aware of the likelihood of such an occurrence. That his karinda should have taken an active part in the riot is sufficient to warrant the conviction of the owner, under s. 154 of the Penal Code.

THE facts of this case appear from the judgment of the Court.

Mr. *A. H. S. Reid,* for the Crown.

Mr. *J. E. Howard* and Munshi *Bishan Sahai,* for the respondent.

EDGE, C.J., and BRODHURST, J.—This is an appeal on behalf of the Government. Payag Singh is a zemindar. His agent was Jai Mangal Singh. Payag Singh had a dispute with one of his tenants as to a clump of bamboos. His agent, Jai Mangal, not being content to allow the civil Court to settle the dispute, went to the field accompanied by a lot of men. He in fact fomented the riot in which Pir Khan, the man with whom the dispute was as to the clump of bamboos, was killed. Payag Singh was fined Rs. 1,000, under s. 154 of the Indian Penal Code. The late Sessions Judge of Benares set aside that order, being of opinion that the section did not apply, as it was not proved that Payag Singh knew or had reason to believe that a riot was about to be committed. The knowledge of the owner or occupier in cases of this kind is immaterial. He is liable for the acts of his commission

and the acts of omission not only of himself but of his agent or manager. Payag Singh's karinda, so far from using all lawful means in his power to suppress the riot and the unlawful assembly, took all unlawful means in his power to encourage it. In our opinion the Judge ought not to have interfered in this case. We allow the appeal and set aside the order of the Sessions Judge, and convict Payag Singh, under s. 154 of the Indian Penal Code, and sentence him to a fine of Rs. 1,000, which is to be realized according to law.

Appeal allowed.

BENGAL SECRETARIAT LIBRARY.

REVISIONAL CRIMINAL.

1890.
July 4th.

Before Mr. Justice Young.

DWARKA LAL (APPLICANT) *v.* MAHADEO RAI AND OTHERS (OPPOSITE PARTIES).

Criminal Procedure Code, ss. 226, 227—Power of Sessions Judge to withdraw a charge framed by him.

The word "alter" in s. 227 of the Criminal Procedure Code includes withdrawal by a Sessions Judge of a charge added by him to the charge on which the commitment has been made.

THE facts of this case sufficiently appear from the judgment of Young, J.

Mr. *G. T. Spankie*, for the applicant.

Mr. *J. E. Howard*, for the opposite party.

YOUNG, J.—In this case the accused were originally charged by the Magistrate and committed for trial under s. 395, Indian Penal Code. When the trial commenced in the Court of Session, the Judge of his own motion added additional charges under ss. 147, 149 and 452, Indian Penal Code. Prior to the conclusion of the trial, the Judge withdrew the charges which he had himself added, and tried the prisoners on the original charge only, without putting the case on the additional charges to the assessors at all. Finally, the accused persons were acquitted of the original charge of dacoity.

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This Court is moved to set aside the proceedings of the lower Court and to direct that the case be tried out on the charges framed by the Judge himself and which were withdrawn by him.

Ss. 226 and 227 of the Criminal Procedure Code deal with the powers of a Court as to framing a charge, or adding to, or otherwise altering a charge when a person has been committed for trial, either without a charge at all, or with an imperfect, or erroneous charge, and Mr. *Spankie* invited the Court's attention to *Queen-Empress* v. *Appa Subhana Mendre* (1) and also *Empress* v. *Poreshollah Sheikh* (2). The learned counsel for the applicant contended that although s. 227 expressly authorizes any Court to alter any charge, at any time before the opinions of the assessors are expressed, yet in that section the word "alter" ought not to be taken to be tantamount to "expunge," and that the word "charge," ought not to be read as meaning any head of the charge. No doubt s. 215, Criminal Procedure Code, declares that a commitment once made by a competent Magistrate can only be quashed by the High Court, but there is no express law as far as I am aware which prohibits a Court of Session to withdraw a charge framed by itself at the commencement of a trial and which such Court subsequently considers to have been an improper charge. To this extent I think the word "alter" in s. 227, Criminal Procedure Code, must be taken to include withdraw. The more usual procedure where a Court considers there is no evidence to lay before the assessors, is for the Court itself to record a finding under s. 289, Criminal Procedure Code, to that effect. But it should be observed that this section applies only where there is no evidence, and would not cover a case where the Court considers that the charge was in itself improper.

I am therefore not of opinion that any action on the part of this Court is required in the present instance. The application is dismissed.

Application rejected.

(1) I. L. R., 8 Bom., 200. (2) 7 Calc. L. R., 143.

APPELLATE CIVIL.

1889
December 21

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

KISHORE SINGH (DEFENDANT) *v.* SABDAL SINGH AND ANOTHER (PLAINTIFFS).*

Plaint, rejection of—Civil Procedure Code, ss. 54, 56.

S. 54 of the Civil Procedure Code may be applied at any stage of a suit.

This was a suit for pre-emption based on the *wajib-ul-arz* of a village, Lechura, in the district of Jhánsi. The plaintiffs had brought a previous suit against the defendants for the same purpose, and the plaint in that suit alleged that the sale in respect of which the suit was brought was illegal and void, the deed having been executed without consideration and for the purpose of defrauding the plaintiffs. The plaint was admitted and registered, and one of the issues recorded was :—"Are the plaintiffs barred from claiming pre-emption by their assertion that the deed is illegal?" At the hearing of the suit, the Court of first instance (Assistant Commissioner of Jhánsi) made an order rejecting the plaint on the ground that a right of pre-emption could not be claimed in respect of a sale impugned by the plaintiffs as illegal. In rejecting the plaint, the Court observed that the plaintiffs had "the remedy of instituting the suit afresh in proper form." No appeal was made by the plaintiffs from the order rejecting their plaint. They subsequently instituted the present suit.

The Court of first instance (Deputy Collector of Jhánsi), after referring to the previous suit and to the order which terminated it, observed, "With all deference to the learned Judge, I think that a fresh suit cannot lie, on the general principle of *res judicata*. The plaintiffs were at perfect liberty to advance alternative claims, and if the Court found that the claim of pre-emption could not proceed in the face of the plaintiffs' allegations as to the deed being collusive, the case should have been thrown out for good." The Court accordingly dismissed the suit as barred by s. 13 of the Civil Procedure Code.

* First Appeal No. 146 of 1888, from an order of G. E. Ward, Esq., Commissioner of Jhánsi, dated the 4th August 1888.

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The plaintiffs appealed to the Commissioner of Jhánsi, who observed in his judgment :—"The question is whether this order [*i.e.*, the order in the previous suit rejecting the plaint] bars the institution of a suit for pre-emption in which the validity of the sale is not impugned. I hold that it does not. The sale-deed has not been proved to be invalid or illegal. The plaintiffs are now apparently content to accept it. I do not see why they should be barred from suing for pre-emption if they admit the validity of the deed. I reverse the order of the lower Court, and remand the suit for disposal on the merits."

The defendants appealed to the High Court from the order of remand. It was contended on their behalf that the order rejecting the plaint in the former suit must be treated, not as such rejection, but as a decree dismissing the suit, inasmuch as the Court was not competent to reject a plaint, under s. 54 of the Code of Civil Procedure, after the plaint had been registered.

Pandit *Sundar Lal* for the appellant.

Munshi *Ram Prasad* for the respondents.

EDGE, C. J., and TYRRELL, J.—This is a suit for pre-emption. The first Court dismissed the suit on the single ground that it was barred under s. 13 of the Code of Civil Procedure by what had taken place in a previous pre-emption suit between the parties. The Commissioner of Jhánsi held on appeal that there was no bar, and remanded the case under s. 562. From that order this appeal has been brought. The plaint in the previous pre-emption suit had, after the issues had been framed, been rejected on the ground that, on the plaint, the plaintiff had not shown any cause of action, that is, that having alleged the sale to be fraudulent, illegal, and void as against him, he could not claim pre-emption. We are of opinion that the order of remand was properly made. It has been contended that s. 54 of the Code of Civil Procedure could only be applied before registration of the plaint, and that the order in the pre-emption suit of rejection of the plaint having been made after registration, must be treated as an order of dismissal of the suit, and not as an order of rejection of the plaint. In support of this con-

tention, that s. 54 can only be applied prior to the registration of the plaint, Pandit *Sundar Lal* cited a judgment of the Madras High Court in the case of *Valiya Kesava Vadhyar* v. *Suppan Nair* (1) and the judgment of the Calcutta High Court in the case of *Hubibul Hossein* v. *Mahomed Reza* (2). With regard to these judgments it is to be observed that the learned Judges gave no reason for the conclusion at which they had arrived. It was contended that s. 54, being found in Chapter V which bears the heading "of the institution of suits," must be deemed to relate only to the procedure prior to registration. That this argument could not apply to all the sections included in Chapter V is obvious by a reference to s. 53, under which, on the grounds therein mentioned, the Court may reject a plaint at or before the first hearing. The first hearing must necessarily follow the registration. In s. 53 there is provided a limitation as to time. S. 54 provides no such limitation, and apparently s. 54 is applicable at any stage of the suit. Our brother Mahmood, at page 101 of the report of his judgment in the case of *Damodar Das* v. *Gokal Chand* (3), is reported to have said, "What I have said does not, of course, apply to rejection of plaints under s. 54, wherein no words importing a limitation of time occur." We think that our brother Mahmood took a proper view of s. 54. A similar view was taken of a somewhat corresponding section in the previous Code of Civil Procedure. The Madras High Court in the case of *Chetti Gaundan* v. *Sundaram Pillai* (4) decided that the Court had power to reject a plaint as barred by limitation after the plaint had been registered. The Calcutta High Court in the case of *Ram Gutty* v. *Goonomonee Dabee* (5) held that the Munsif in that case could reject and need not dismiss a plaint which was undervalued, after the evidence had been received. The Calcutta Court also in the case of *Musammat Edoo* v. *Shaikh Hefazut Hossein* (7) held that a plaint might be rejected even in the High Court on the ground of stamp after the suit had come up from the lower Court. It appears to us that we cannot look on s. 54 as being limited in

(1) I. L. R., 2 Mad. 308.
(2) I. L. R., 8 Calc. 192.
(3) I. L. R., 7 All. 79.
(4) 2 Mad. H. C. Rep., 51.
(5) 11 W. R., 177.
(7) 13 W. R., 358.

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time by the mere fact that it is included in Chapter V or that it precedes in the Code the sections relating to rejection, fixing of issues and other sections of that kind. The section appears to us to be one which is capable of being and is intended to be applied at any stage of the suit. If it was intended to limit s. 54, we should have expected to have found in it some words creating limitation, when we find there are such words in s. 53, which immediately precedes it. This order, rejecting the plaint was one within the meaning of s. 56; it therefore creates no bar to the present suit. Pandit *Sundar Lal* also raised the question of limitation, but as this subject has not been dealt with by either of the Courts below, he has not pressed that contention. That is one of the subjects which must be dealt with during the suit.

The order below is confirmed and the appeal is dismissed with costs.

Appeal dismissed.

1890. *February* 8.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

WAHID ALAM (DEFENDANT) v. SAFAT ALAM AND ANOTHER (PLAINTIFFS).*

Practice—Suit for exclusive possession of property—Court competent in such suit to decree joint possession.

Where the plaintiff claimed exclusive possession of immoveable property to which the defendant also claimed to be exclusively entitled,—*held* that the Court was competent, upon the finding that the property belonged to the parties jointly, to give the plaintiff a decree for joint possession. *Wali-ullah Khan* v. *Muhammad Israr-ullah Khan* (1) distinguished.

THE facts of this case were as follows. The plaintiff alleged in his plaint that between his house and that of the defendant there was a courtyard which belonged exclusively to the plaintiff; that there was a door in his house opening upon the courtyard; and that the defendant, by closing this door, had deprived the plaintiff of the use of the courtyard. The object of the suit was to recover possession of the courtyard, to have the door opened, and to restrain the

* Second Appeal No. 486 of 1888, from a decree of Babu Lalta Prasad, Subordinate Judge of Gházipur, dated the 20th February 1888, confirming a decree of Babu Bepin Behari Mukerjee, Munsif of Gházipur, dated the 9th September 1887.

(1) I. L. R., 10 All., 627.

defendant from interfering with the plaintiff's use of the door and the courtyard.

The defendant resisted the suit upon the allegation that the courtyard belonged exclusively to him and not to the plaintiff, and that the door had been closed in pursuance of an arbitration award under which the property of the parties had been partitioned.

The Court of first instance (Munsif of Gházipur) found that the courtyard was not the exclusive property of either of the parties, and that the door had for more than twenty years been used by the plaintiff, and its closing was not justified by the terms of the award. Its order was, "the plaintiff's claim is accordingly decreed for the recovery of joint possession of the courtyard, and also to have the door in dispute re-opened."

The defendant appealed to the Subordinate Judge of Gházipur, who dismissed the appeal, agreeing with the findings of the Court of first instance. In his judgment the Subordinate Judge observed :—"It is now argued that the plaintiffs sued for their exclusive possession of the courtyard, and the defendant declared the same to be in his exclusive possession, and therefore the lower Court was wrong to pass a decree for joint possession. This argument to my mind has no force. If the courtyard was proved to be the joint property of the parties, there was nothing to bar the passing of a decree for joint possession."

The defendant appealed to the High Court, his principal ground of appeal being that "the lower Courts have erred in law in passing a decree in favour of the respondent contrary to the relief sought for in the plaint."

Mr. *Howard* and Mr. *Amir-uddin*, for the appellant.

Pandit *Bishambhar Nath*, Pandit *Sundar Lal*, and Munshi *Ram Prasad*, for the respondents.

BRODHURST and TYRRELL, JJ.—The point in controversy in this second appeal is whether the Court below has rightly decided that the respondents are entitled to the use of a certain door which the appellant says should be shut up, and that the compound upon

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which the door opens is the common property of the parties. The respondents came into Court alleging that the compound is their exclusive property; the defendant replied that it was his exclusive property. The Court below, after local inspection has found, for reasons which seem to us to be sound, that both parties have exaggerated their interest in the courtyard, which in fact remains now as it has always been, common to the parties. The Court below also has given reasons which we see no reason for discrediting for holding that the door now in controversy is not the door which was closed in the compromise which took place between the parties a great many years ago. These are findings of fact. But the learned counsel for the appellant urges that in respect of the decision that the courtyard is common, the Court below has erred in law, inasmuch as it should not have granted to the respondents a relief other than that claimed by them and based on grounds not avowed by them. The learned counsel relied, amongst other cases, on a ruling at page 627 of I. L. R. 10 All.

That case seems essentially distinguishable from the present, in which the parties have on both sides overstated their interest in the courtyard but have not made allegations inconsistent with the use of the courtyard which the Court has awarded to them. The appeal fails and is dismissed with costs.

Appeal dismissed.

1890. *February* 20.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BAISNI (PLAINTIFF) *v.* RUP SINGH (DEFENDANT).*

Hindu Law—Hindu widow—Maintenance.

In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and status of the widow, and the expenses involved by the religious and other duties which she has to discharge. *Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nath Mullick* (1) and *Narhar Singh* v. *Dirgnath Kuar* (2) referred to.

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* First Appeal No. 125 of 1888, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 23rd December 1885.

(1) L. R., 5 IA., 55. (2) I. L. R., 2 All., 407.

Per Mahmood, J.—The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only a "starving allowance." The austerities enjoined upon Hindu widows are matters not of legal obligation, but only of moral injunction, and cannot be enforced by Courts of justice. The Courts should bear in mind that Hindu widows are by ancient custom debarred from remarriage, and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality.

THE facts of this case are stated in the judgment of Straight, J.

Pandit *Bishambhar Nath* for the appellant.

Babu *Sital Prasad Chatterji* and Munshi *Sukhnundan Lal*, for the respondent.

STRAIGHT, J.—This appeal relates to a suit for maintenance brought by the plaintiff-appellant before us against the defendant-respondent, her uncle by marriage. The defendant is the present Rája of Bhara, which is an impartible Rá j, and he succeeded in obtaining possession of that Rá j under a decree of their Lordships of the Privy Council in the year 1884. The deceased Rája Mahendra Singh was the nephew of the defendant, and the plaintiff is his childless widow.

The parties are Chhattris and of high caste, and for the purpose of determining the question, and the only question before us in appeal, we must take it that the income of the defendant derived from the property to which he has succeeded, is approximately Rs. 22,000 per annum. It may be more at times, or it may be less.

The plaintiff in her plaint asserted that from the date when she was removed from possession on the 2nd August 1884, down to the institution of the present suit, which was on the 18th August 1887, the defendant had not paid any maintenance to her, and she asked for a decree declaring that she was entitled to Rs. 6,000 per annum, as maintenance allowance, that the unpaid maintenance of Rs. 18,000 from November 1885 to November 1887, be allowed her, and that she be put in possession of a house in mauza Amana, pargana Auraiya, zila Etáwah, as a place of residence. The defendant pleaded a number of pleas, among others

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that the plaintiff had no claim to maintenance, that any claim she had to maintenance was as against her mother-in-law and not against him, and that the amount of Rs. 500 monthly claimed by her was an absurd sum, as also other matters to which it is not necessary for me to refer.

The learned Subordinate Judge who tried this case as a Court of first instance, came to the conclusion that the plaintiff was entitled to maintenance, and he declared that maintenance to be at the rate of Rs. 375 per quarter, the same to be a charge on the immoveable property of the defendant, and he further gave her a decree for Rs. 4,500 representing the arrears of maintenance due upon this calculation, for the three years preceding the date of the suit.

From this decree the plaintiff has appealed. There is no cross appeal by the defendant. The plaintiff's ground of complaint is that the allowance made by the lower Court is inadequate and insufficient, having regard to all the circumstances of the case, and that is the sole and single point to which the learned pleader on behalf of the appellant has addressed himself, and in respect of which we have heard the reply on the part of the respondent.

The only question therefore for us to determine is, is the amount fixed by the Subordinate Judge, *viz.*, Rs. 375 per quarter or Rs. 125 per mensem, a sufficient allowance for the plaintiff?

In the case of *Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nath Mullick* (1) their Lordships of the Privy Council have expressed themselves in the following way:—"Another question arises, however, in the suit, namely, the maintenance to which the defendant is entitled as a widow, upon the assumption that the plaintiff was the adopted son of her husband. Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a Master attached to the Court,

(1) L. R., 5, I. A., 55.

for the Court to refer to the Master the question of maintenance and to consider the proper amount upon hearing the report. In this case the Court did not apparently make any separate inquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them upon the general case. An ordinary form of reference appears to have been this: Refer it to the Master to settle the amount, regard being had to the value of the estate. Their Lordships think that another element to be considered is the position and status of the deceased husband and of the widow. The main subject of inquiry would be the value of the estate; and the question for the Master, and ultimately for the Court, to consider, would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy."

In the case of *Narhar Singh* v. *Dirgnath* (1) I expressed myself much to the same effect. I there said," No precedents were quoted to us fixing any principle of computation to apply to a case like the present, and it may well be that there are none, for the question that now arises involves equitable considerations that must of necessity be affected by the peculiar circumstances of each individual case."

I may remark in passing that there as here the widow was a childless widow, but I said that in my opinion the circumstance that she was a childless widow in no degree altered her right to maintenance, or differentiated the principles upon which maintenance should be calculated, and it seems to me that is the correct view.

The points therefore for consideration are, looking to the value of the defendant's estate which may be gauged by the annual income derivable therefrom, the position and status of the late Rája Mahendra Singh, the husband of the plaintiff, and to her position and status, what is a reasonable sum to allow for her maintenance? There is evidence upon the record to show that she has many

(1) I. L. R., 2 All., 407.

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expenses which, as the widow of the last Rája, she must incur in order to maintain her position in a suitable and proper manner. She also has certain religious and other ceremonial duties to discharge which involve expenditure, and I think I shall be making a low estimate if I calculate that expenditure at Rs. 250 per mensem. That will make in all a sum of Rs. 3,000 per annum, which, with the Rs. 1,500 that has been already given in the former decree to Musammat Chandelji, will render the defendant as the Rája in the present occupation of the gaddi subject to the payment of an annual sum of Rs. 4,500 to these two ladies, which certainly does not seem to be an unreasonable or excessive amount. For these reasons therefore I would decree this appeal in part, and modify the decree of the Subordinate Judge to this extent, that the plaintiff will be declared entitled to a maintenance allowance of Rs. 250 per mensem, such maintenance allowance to be a charge upon the Ráj estate. I would further order that the plaintiff do recover from the defendant the sum of Rs. 9,000 representing the arrears for the three years antecedent to the date of the institution of the suit. I give the plaintiff her costs of the litigation in both Courts in proportion to her success.

MAHMOOD, J.—I am also of the same opinion, and agree entirely in all that has fallen from my learned brother as to the legal aspect of the duties which devolve upon us as Judges to discharge functions analogous to those of assessing damages as in cases of tort. In this case my brother has, relying upon the Privy Council ruling and also upon an earlier judgment of his own to which he has referred, explained how the main element for the purpose of deciding the exact *quantum* of maintenance allowance should be determined. Mr. *Chatterji* who has appeared on behalf of the respondent could not resist the argument which was addressed on behalf of the appellant otherwise than by contending that because under the Hindu law, the life of a widow lady, no matter of what rank or position she may be, is to be one of a peculiarly ascetic character, therefore a widow under conditions such as those of the plaintiff should not be allowed more than what would be called a starving allowance, and upon this ground the learned pleader suggested that we should

hold that Rs. 20 or 35 per mensem would be adequate to enable her to do what is called in English keeping the body and soul together. In support of this view the learned pleader has referred us to certain observations in the case of *Rája Pirthee Singh* v. *Ránee Ráj Kooer* (1) and the Calcutta ruling in *Hurry Mohun Roy* v. *Sreemutty Nyautara* (2) and also to a ruling of the Privy Council in the same case of *Rája Pirthee Singh* v. *Ránee Ráj Kooer* (1). Without entering into any minute discussion or consideration of the effect of these rulings, I have no doubt that whatever austerities or stringencies or ascetic rules may be provided by the Hindu law for widows, they are not legal obligations but simply moral injunctions, such as a Court of justice cannot enforce, and are not required by the mandate under which we administer justice. What we have to consider is the condition and rank of the deceased husband, which would give an indication as to the social circumstances and status which his widow should possess and uphold by means of the pecuniary maintenance to be allowed to her, with due regard to the extent and value of the estate from which the maintenance is to be derived.

In this case if this lady, Ráni Baisniji, the plaintiff-appellant, had only been fortunate enough not to become a widow, and if her husband had been alive, she would be the owner of what my brother has described as an income of Rs. 22,000 per annum.

There is much in what my learned brother has pointed out to show that even now there are expenses devolving upon her which are represented here in the evidence of Pandit Niranjan Nath to be at least Rs. 400 or 500 per mensem.

In considering this question of the assessment of maintenance we should not allow ourselves to be influenced either by sentimental considerations on the one hand or by any rigid notion of our own on the other, but to proceed entirely upon a fair and equitable estimate of the ordinary requirements of a lady in the position of the present plaintiff. What my brother has awarded is in my opinion by no means a sum higher that would be required by this

(1) N.-W. P. H. C. Rep., 1870, p. 170. (2) 25 W. R., p. 474.
(3) 12 B. L. R., 238.

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lady to maintain herself in the rank in life in which she was born and in which she is entitled to live as the widow of her husband.

Another observation which I wish to make is that, in dealing out a mediæval system of jurisprudence to a population such as that to which the parties to the present suit belong, we sitting here, as Her Majesty's Judges, cannot forego the consideration that, unlike other countries, the widow in this case has no chance of a respectable marriage under the ancient custom which undoubtedly by reason of her caste governs her. I made observations very similar to these in the case of *Janki* v. *Nand Ram* (1) and I repeat similar observations now, because if this lady the plaintiff-appellant is to be doomed, as she must according to the custom in her caste be doomed, to eternal widowhood, a Court of justice should bear this in mind in fixing the amount of maintenance which should be sufficient to make her life as far as possible one of comfort, and not such as might drive her to circumstances throwing blame upon her of immorality.

I have added these observations in order to show that I sitting here as a native of India look upon the assessment made by my learned brother as one which is by no means such as the defendant-respondent should complain of.

Appeal allowed.

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February 26.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

TAKADDUS FATIMA AND ANOTHER (PLAINTIFFS) *v.* BALDEO DAS AND OTHERS (DEFENDANTS).*

Execution of decree—Transmission of decree to Collector for execution—Civil Procedure Code, s. 320—*Power of Local Government to make rules for regulating procedure of Collector—Rule providing for appeal from Collector to Commissioner not ultra vires—Rule No.* 17, *cl. XIX of* 12*th November* 1883 —*Act VII of* 1888 (*Civil Procedure Code Amendment Act*), *s.* 30—*Act XIX of* 1873 (*N.-W. P. Land Revenue Act*), *s.* 243.

The authority conferred upon the Local Government by s. 320 of the Civil Procedure Code prior to the amendment of that section by s. 30 of the Civil Proce-

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* Second Appeal No. 558 of 1888 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 11th January 1888, confirming a decree of Munshi Ahmad Ali, Munsif of Bulandshahr, dated the 16th September 1887.

(1) I. L. R., 11 All., 194.

dure Code Amendment Act (VII of 1888), to make rules for regulating the procedure of the Collector in executing decrees transmitted to him, included power to make a rule providing for an appeal from the Collector's orders.

Clause XIX of Rule 17 which was added to the Rules (No 671 of 30th August 1880) published in the *N.-W. P. and Oudh Gazette* of the 4th September 1880, by a notification in the Gazette of the 17th November 1883, and which made the order of a Collector confirming a sale appealable to the Commissioner of the Division, was therefore not *ultra vires* of the Local Government. *Madho Prasad* v. *Hansa Kuar* (1) referred to.

S. 243 of the N.-W. P. Land Revenue Act (XIX of 1873) does not apply to such orders passed by a Collector.

THE principal question raised in this case was whether clause XIX of Rule No. 17 of the Rules made by the Local Government under s. 320 of the Civil Procedure Code on the 30th August 1880, which were published in the *N.-W. P. and Oudh Gazette* of the 17th November 1883, was a valid Rule under s. 320, or was *ultra vires* of the Local Government. That rule is as follows :—

" All orders under clause XIII passed by a Collector shall be subject to appeal to the Commissioner of the Division, whose order shall be final."

The facts of the case were as follows. On the 20th August 1885, the immoveable property of certain judgment-debtors was sold in execution of the decree, and on the 21st August 1885, the auction-purchasers sold the same property to the plaintiffs in this suit, who obtained possession. On the 9th September 1885, the decree-holders applied for cancelment of the sale of the 20th August, on the ground of certain irregularities, but their objections were overruled and the sale confirmed by the Deputy Collector exercising the powers of a Collector under the rules made by the Local Government under s. 320 of the Civil Procedure Code.

The decree-holders then appealed to the Collector, who set aside the Deputy Collector's order confirming the sale, and ordered the property to be resold, and it was resold accordingly on the 20th June 1886, the decree-holders being the purchasers.

(1) I. L. R., 5 All., 314.

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The plaintiffs then appealed from the order of the Collector to the Commissioner of the Division, who rejected the appeal, observing, however—"At the same time I would draw the attention of the Collector to the fact that if the Deputy Collector has been invested with the powers of a Collector for conducting these sales, then the sole appeal lies to the Commissioner." The plaintiffs applied to the Board of Revenue for revision of the Commissioner's order, but the application was rejected.

They then instituted the present suit against the decree-holders, purchasers under the sale of the 20th June 1886, and prayed for a declaration that they might be declared entitled to the property as purchasers under the sale of the 21st August 1885, and that that sale was validly confirmed, and that the orders of the Collector, the Commissioner and the Board of Revenue were null and void.

The Court of first instance (Munsif of Bulandshahr) dismissed the suit. In the course of his judgment the Munsif observed—"Assuming that the Deputy Collector had been invested with the powers of a Collector, still the jurisdiction of the Commissioner, who eventually upheld the Collector's order setting aside the sale, cannot be questioned. Hence it cannot be correctly contended that the order setting aside the sale was passed by a Court having no jurisdiction. The irregularity, if any, *in limine*, was subsequently rectified on the Commissioner setting aside the sale. It is to be observed that it was the plaintiffs themselves who appealed to the Commissioner against the Collector's order, and then not content went to the Board of Revenue and applied for revision of the Commissioner's order. It has been held that the principle is that where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. Here the Commissioner has jurisdiction, but when the plaintiffs themselves invited him to exercise it in a wrong manner, by filing an appeal against the Collector's order, who is alleged to have no jurisdiction, they cannot now question the

legality of the Commissioner's order. The irregularity was therefore covered by the assent of the plaintiffs. It appears that the plaintiffs did not raise the plea of the Collector's want of jurisdiction before the Commissioner. It was the Commissioner himself who remarked about it, but he did not consider the irregularity so material as sufficient to vitiate the Collector's proceedings. For the above reason I dismiss the suit with costs."

The plaintiffs appealed to the District Judge of Meerut, who dismissed the appeal, holding that "under the circumstances the Commissioner's intention must be taken as simply to make the Collector's order his own, to pass an order in uniform terms with those of the Collector's order, as if the appeal had come to him direct from the Deputy Collector, and I am not prepared to say that he could not do this....The Commissioner was the right appellate Court, and it appears to me that in such a case the appellate Court would have full power to decide the case upon its merits without putting the parties to the cost and delay of *de novo* proceedings, and were this Court also to declare the Commissioner's order invalid the result would simply be that the parties would be put to still further delay and expense, and, I may add, without the slightest chance of any different result in the end. There can be no question that the Commissioner was fully justified in setting aside the sale when it was shown by the record that incumbrances were notified to the extent of over Rs. 35,000, while they really existed only to the extent of Rs. 8,000."

The plaintiffs appealed to the High Court. One of the grounds set forth in their memorandum of appeal was that "the Commissioner had no authority to hear the appeal from the Collector's order."

Mr. *Amir-ud-din*, for the appellants.

Munshi *Juala Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondents.

EDGE, C.J., and BRODHURST, J.—The only question involved in this appeal is as to whether the Local Government had on the 12th

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November 1883, power to pass a Rule, No. 17, clause XIX, which made the order of a Collector confirming a sale, appealable to the Commissioner of the Division. It was indeed also contended that such an order was appealable to the Commissioner under s. 243 of Act XIX of 1873, but that contention is, in our opinion, unsound. The preamble and the whole scope of that Act show that we could not apply s. 243 to a case like this. This was not a case falling within clause 2, 3 or 4 of s. 323 of the Code of Civil Procedure. Here the whole property had been sold. So far as is necessary, the facts of this case are that, prior to the passing of Act VII of 1888, and subsequent to the 17th November 1883, when the rule referred to was published in the Gazette of these Provinces, a Deputy Collector, exercising the powers of a Collector, made an order confirming a sale in a case in which the execution of the decree had been transferred to the Collector under s. 320 of the Code of Civil Procedure. Now the simple point we have to decide is, did an appeal lie from that order? As s. 243 of Act XIX of 1873 does not apply, that point has to be determined on the answer to be given to the first question we have mentioned, namely, was the Rule which appeared in the Gazette of the 17th November 1883, *ultra vires* or not? Under s. 320 of the Code of Civil Procedure, the Local Government was given powers to prescribe rules for, amongst other things, regulating the procedure of the Collector and his subordinates in executing decrees transmitted under s. 320. Now the wording of that section is not very clear, and whether the amendment of the section which was effected by Act VII of 1888, was intended merely to make clearer the intention of the section, or to give to the Local Government a power which it did not possess under s. 320, as it stood prior to Act VII of 1888, does not appear. This Court on the 24th February 1883, in the case of *Madho Prasad* v. *Hansa Kuar* (1) decided that there was no appeal to this Court from the order of a Collector confirming a sale. The judgment in that case indicated generally that the Collector was subject to the chief controlling revenue authority in the exercise of his duties in the matter of Civil Court decrees transferred to him for execution. It is true that

(1) I. L. R., 5 All., 314.

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that case is not an authority on the question before us, but we cannot conceive that it was the intention of the Legislature that the Local Government should provide no means of appeal from an order of a Collector confirming a sale. The Legislature itself had not provided a means of appeal in such a case as the present, unless it did so by deputing its powers in that respect to the Local Government under s. 320 of the Code of Civil Procedure. Now, as we have pointed out, the Local Government under that section was authorized to prescribe rules for regulating the procedure of the Collector. We do not think it would be unduly straining language to hold that rules regulating the procedure of the Collector would include rules providing for an appeal from his orders. The point is not by any means a clear one, but we feel that, if possible, we ought to hold that the Rule which was published in the Gazette of the 17th November 1883 was within the powers of the Local Government. We consequently dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Tyrrell.

1890. *March 4.*

MITTHU LAL AND OTHERS (DECREE-HOLDERS) *v.* KHAIRATI LAL (JUDGMENT-DEBTOR).*

Execution of decree—Decree payable by instalments—Limitation—Waiver by decree-holder—Payment out of Court—Act XV of 1877 (*Limitation Act*), *sch. ii, No* 179 (6) —*Civil Procedure Code, s.* 258.

An application for execution of a decree payable by instalments was resisted by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards, and that the application was in time, having been made within three years from the date when the second instalment was due.

Held that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under s. 258 of the Civil Procedure Code, be recognized. *Sham Lal* v. *Kanahia Lal* (1) and *Zahur Husain* v. *Bakhtawar* (2) not followed.

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* Second appeal No 43 of 1890 from a decree of A. M. Markham, Esq., District Judge of Aligarh, dated the 23rd September 1889, reversing a decree of Babu Shee Sahai, Munsif of Kasganj, dated the 29th January 1889.

(1) I. L. R., 4 All., 316. (2) I. L. R., 7 All., 317.

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MITTHU LAL v. KHAIRATI LAL.

The facts of this case are sufficiently stated in the judgment of Tyrrell, J.

Babu *Durga Charan Banerji* and Munshi *Ram Prasad*, for the appellants.

Babu *Dwarka Nath Banerji*, for the respondent.

TYRRELL, J.—In this second appeal the appellants are the decree-holders, the respondent being the judgment-debtor. The appellants got their decree on the 19th July 1884. It provided that the debt should be paid in instalments of Rs. 100 payable on *nisf Aghan* 1941, a similar sum to be paid on *nisf Aghan* 1942, and the last instalment of Rs. 75 being payable in Sambat 1945. *Nisf Aghan* 1941 is equivalent to the 17th November 1884. The appellants are met in their attempt to execute the decree by a plea that nothing has been paid under the decree and therefore the execution is barred. The decree-holders on the contrary contend that the judgment-debtor paid Rs. 100 on the 19th November 1884, that is to say, two days after the decretal date, and that they, having accepted the payment, had waived the unpunctuality of the judgment-debtor, and that the present application is within time, being made less than three years from the date of the second instalment of November 1885. Now the lower appellate Court has held that the plea of waiver cannot be entertained under art. 179, sch. ii of the Limitation Act. Conflicting rulings of this Court upon the point have been cited on both sides to-day, and I would on that account, although I have myself no doubt upon the question, have referred the hearing of the appeal to a Bench of two Judges if it had not been for one circumstance, that is, that in my judgment it is not competent to the decree-holders to raise the plea of waiver at all, inasmuch as the payment of 19th November 1884, alleged by them, is not a payment which can be recognized by any civil Court under s. 258 of the Civil Procedure Code. Mr. *Durga Charan* for the appellants relied upon two judgments of this Court, one being *Sham Lal* v. *Kanahia Lal* (1) in which it was held that the decree-holder is entitled to give proof of payment made out of

(1) I. L. R., 4 All., 316.

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Court and not certified to the Court in order to defeat the judgment-debtor's plea of limitation. That judgment was given in conformity with the Full Bench ruling of the Calcutta Court in *Fakir Chand Bose* v. *Madun Mohan Ghose* (1) and no doubt under the terms of s. 258 of the Civil Procedure Code as it stood before the statute of 1882 was passed, the ruling was passed in conformity with the terms of the law. But a very marked change was introduced in the year 1882 in s. 258 of the Civil Procedure Code, and under the section as it now stands I have no doubt whatever that I am precluded from taking any recognition whatsoever of the alleged payment of the 19th November 1884, and if I cannot recognize the payment I must hold that there was no waiver whatever on the appellants' part, and that the execution of their decree is barred. But Mr. *Durga Charan* relied upon another judgment of this Court made under the Civil Procedure Code of 1882 in *Zahur Husain* v. *Bakhtawar* (2). That judgment is in Mr. *Durga Charan's* favour, but it was passed with exclusive reference to the ruling in *Sham Lal* v. *Kanahia Lal* (3) which I have referred to above, and without reference to the circumstance that the law had since entirely changed upon the point since the last mentioned ruling had been made. I cannot follow this authority, and I must hold that there is no evidence of any waiver on the part of the decree-holders appellants, and that the Court below has rightly held that the execution of their decree is barred. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

1890. *May* 5.

GANDHARAP SINGH (DECREE-HOLDER) *v.* SHEODARSHAN SINGH (JUDGMENT-DEBTOR).*

Execution of decree—Transfer of decree for execution—Agreement for satisfaction of judgment debt by instalments—Civil Procedure Code, ss. 210, 230, 257*A*—*Act XV of* 1877 (*Limitation Act*), *sch. ii, No.* 179.

A simple money decree was passed in 1871, and was transferred to another Court for execution, and in June 1882 an application was made for execution; and,

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* Appeal No. 11 of 1890, under s. 10, Letters Patent.

(1) 4. B. L. R., 130. (2) I. L. R., 7 All., 317.
(3) I. L. R., 4 All., 316.

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shortly afterwards, the Court to which the decree had been transferred sanctioned an agreement between the parties for satisfaction of the decree by instalments. In June 1885, an application was made to the Court which passed the decree to again transfer it for execution, and this application recited the previous agreement and certain payments which had been made, and it was granted. A further application for execution for the remaining instalments was made in April 1888.

Held by Edge, C.J., that the Court to which the decree was transferred had no power in 1882, to sanction the agreement under s. 257 A of the Civil Procedure Code; that if the order in June 1885, of the Court passing the decree were regarded as a sanction (which it would be very difficult to hold), that order nevertheless could not operate as one under s. 210 altering the decree; that if any decree in the case were capable of execution it was the decree of 1871, which had never been altered by a Court; and that inasmuch as a previous application for execution had been made in June 1882, that decree was dead, as well under s. 230 of the Code as under art. 179, sch. ii of the Limitation Act (XV of 1877).

Held by Straight, J., that the order of June 1885 was not, and could not be, an order sanctioning the agreement of June 1882, and the decree consequently stood unaltered; and, an application to execute it having been made and granted since Act XIV of 1882 came into operation, the decree was now dead under s. 230 of the Code.

Per Edge, C.J.—The Court to which a decree has been transferred for execution has no power to sanction an agreement under s. 257A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by the Court which passed the decree.

An agreement sanctioned under s. 257A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under s. 210, though an order under s. 210 would operate as a sanction under s. 257A.

The decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as *e. g.*, by an order under s. 210.

This was an application for execution of a decree. The original decree was passed on the 5th June 1871 by a Court at Mainpuri, and was transferred for execution to the Court of the Deputy Commissioner of Jalaun. On the 9th June 1882, the decree being then alive, the decree-holder applied to the Court of the Deputy Commissioner for execution of the decree by payment to him of certain money which had been paid into the treasury; and upon the same date the Court ordered the payment prayed for to be made, and also caused notice to be issued to the judgment-debtor to show cause why certain other applications connected with execution of the decree should not be granted. On the 12th June 1882, the Court at

Jalaun gave its sanction to an agreement between the parties that the decree should be paid by instalments, *viz.*, Rs. 3,000 on the 1st July 1882, Rs. 3,000 on the 1st January 1883, and Rs. 2,411-10-8 on the 1st July 1883. The judgment-debtor paid into Court only Rs. 3,000 on the 1st August 1882, and Rs. 2,500 in February 1885. A further application was made for execution on the 11th June 1885, when the matter again came before the Court at Mainpuri, to which application was made by the decree-holder for a fresh certificate and for a new transfer of the decree to the Court of the Deputy Commissioner at Jalaun for execution. The application for transfer recited the agreement arrived at by the parties and sanctioned by the Court at Jalaun in June 1882, and also recited the payments which had been made by the judgment-debtor. The Court at Mainpuri granted the certificate as prayed, and the decree-holder applied for execution to the Court at Jalaun, but the application was dismissed for want of prosecution. On the 26th April 1888 the decree-holder made the present application in the Court of the Deputy Commissioner of Jalaun to execute the decree for the instalments which remained unpaid.

The application was dismissed by the Court of first instance as barred by limitation, and, on appeal by the decree-holder, the first Court's order was, on other grounds, confirmed by the Commissioner of Jhánsi. The decree-holder made a second appeal to the High Court.

Mr. *G. T. Spankie* and Lala *Jokhu Lal*, for the appellant.

The Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal*, and Munshi *Sukhnandan Lal*, for the respondent.

TYRRELL, J.—Two objections were taken in the Court below to the execution of the appellant's decree. One was that the unfortunate decree-holder, who appears to have lost a large sum of money by reason of the indulgence he showed to his debtor, applied to the Court executing the decree for execution not of the decree but of a compromise. The Court of first instance very properly held that it was not a lawful application for execution of decree, but the Court of appeal for insufficient grounds differed on

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the point, and its view is supported here in second appeal upon the theory that the compromise had really been an amended decree in the sense of s. 210 of the Civil Procedure Code. I have read the decree and I have read the compromise, and the order of the Court thereupon, and it is perfectly obvious that the decree was never altered in the sense of s. 210. It is the common case of a compromise made between the decree-holder and his judgment-debtor being reported to the Court, and nothing more. But the Court below has defeated the decree-holder on another ground, and I think a sound one. The decree-holder relies for protection against limitation upon the application which had been made on 11th June 1885. The application was not made to the Court executing the decree or to the Court which could execute the decree at the time. The facts are that the decree had originally been made by the Mainpuri Court. It was transferred under s. 223 of the Civil Procedure Code to Jalaun for execution, and it has remained in that Court until the present time. The decree-holder however was ill-advised enough to apply on the 11th June 1885 to the Mainpuri Court for a step in aid of execution. The decree-holder's counsel in the Court below admitted that it was a blunder, and so it obviously was. In second appeal it is contended that it was not so, but that it was the duty of the Jalaun Court when the first instalment failed, without being moved by the decree-holder or any one else, to enter into correspondence with the Mainpuri Court, which would lead to the Mainpuri Court recalling the record. I know of no authority either judicial or by way of practice or founded on common sense in support of such a contention. The Court below was right, and the appeal is dismissed with costs.

The decree-holder appealed under s. 10 of the Letters Patent from the judgment of Tyrrell, J.

The parties were represented as before.

EDGE, C. J.—The decree-holder, appellant here, obtained a decree on the 5th June 1871 in the Court at Mainpuri. On the 9th June 1882 the appellant applied to the Court at Jalaun, to which the decree had been transferred, for execution of the decree, and to have

in execution of it some money, which had been deposited in the treasury, paid out to him. On the same day that Court ordered the money which was in the treasury to be paid out to the decree-holder, and also issued a notice to the judgment-debtor to show cause why other applications in connection with the execution of the decree should not be granted. Now in my opinion, on that 9th June 1882, the judgment-debtor made an application to execute the decree within the meaning of s. 230 of the present Code of Civil Procedure under that section, and that application was granted. On that short ground I am of opinion that the decree was time-barred, when the decree-holder made his application of the 26th April 1888, out of which this appeal arose, and on that ground I would dismiss this appeal. It has, however, been contended on behalf of the decree-holder that the decree which he was entitled to execute was not the decree of 1871, but was that decree as altered on 12th June 1882. We must see what it was that was done. After the decree of 1871 had been made, the parties agreed that the decretal money should be payable by instalments of amounts certain at rates fixed, and that, on default of payment of the instalments, the decree-holder should be entitled to execute the decree for the amount remaining unpaid, and for interest on the amounts specified. The Court at Jalaun on the 12th of June 1882, if it had power to do so, did sanction that agreement within the meaning of s. 257A of the Code of Civil Procedure. The Court at Jalaun, however, was not the Court which could sanction any agreement under that section in this case. In this case the Court at Jalaun was merely the Court executing the decree, and the Court which had power to sanction was the Court at Mainpuri, and not the Court at Jalaun. However, the matter having again come before the Court at Mainpuri in June 1885, and two instalments having in the interval been paid, the decree-holder in June 1885 applied to the Court at Mainpuri to transfer the decree again to the Court at Jalaun for execution, and in the application for transfer recited the agreement as to the satisfaction of the decree by instalments, and further recited that two of those instalments which were mentioned had been paid. The Court at Mainpuri granted the certificate of transfer which was

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asked for, and on these facts it is contended, not only that the Court at Mainpuri sanctioned under s. 257A the agreement as to instalments, but actually altered the decree of 1871 into a decree in accordance with that agreement. Now at that time the period within which the instalments were to be paid had expired, the decree was more than 12 years old, and it was further a decree in respect of which an application for execution had been made under s. 230 of the present Code, and granted. It was also a decree in respect of which no application for the execution of the decree or to take any step in aid of execution had been made within three years of June 1885. Mr. *Spankie* on behalf of the decree-holder has cited several authorities of this Court, and has also contended on them, that what took place in June 1885 was a sanction under s. 257A of the Code, and that execution might go in accordance with the terms which had been sanctioned. The cases which he relied on were:—*Sita Ram* v. *Dasrath Das* (1), *Sham Karan* v. *Piari* (2), *Champat Rai* v. *Pitambar Das* (3), *Makund Ram* v. *Makund Ram* (4), *Paraga Kuar* v. *Bhagwan Din* (5), *Ramadhar* v. *Ramdayal* (6), and *Muhammad Sulaiman* v. *Jhukki Lal* (7). There was another case to which Mr. Spankie's attention was drawn by my brother Straight, *Debi Rai* v. *Gokal Prasad* (8), and Mr. *Spankie* with the discretion of an able counsel declined to pay any attention to that case, and contended that that case was at variance with the other cases he had cited. Now I paid very careful attention to the argument, as I always do to any argument of Mr. *Spankie*, and to that argument as commented on by Pandit *Ajudhia Nath*, and I failed to see any conflict on any point material to this case between the decisions in any of the cases on which Mr. *Spankie* relied and that to which I have referred, when those decisions and the facts on which those cases were decided are carefully considered. My opinion is that none of those cases establish Mr. *Spankie's* proposition that an agreement sanctioned under s. 257A of the Code can be treated without anything more as a decree of the

(1) I. L. R., 5 All., 492.
(2) I. L. R., 5 All., 596.
(3) I. L. R., 6 All., 16.
(4) I. L. R., 6 All., 228.
(5) I. L. R., 8 All., 301.
(6) I. L. R., 8 All., 536.
(7) I. L. R., 11 All., 228.
(8) I. L. R., 3 All., 585.

Court. A sanction under s. 257A does not operate as an order under s. 210, although, undoubtedly, an order s. 210 would operate as a sanction under s. 257A. Now I would have very great difficulty in satisfying myself that in making the order for the certificate of transfer the Court at Mainpuri in June 1885 was sanctioning the agreement as to instalments. Whether it did sanction it or not, I am quite satisfied that the decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as *e. g.*, by an order s. 210, and in this case there was in fact and in law no order under s 210, and, so far as I can see, no intention to make an order under that section; indeed no such order was even applied for. I have come therefore to this conclusion on the whole case, that if any decree was capable of execution in this case at all, it was the decree of 1871. That decree never has been altered by a Court, and it is a dead decree, as well under s. 230 of the Code of Civil Procedure as under art. 179 of the 2nd schedule of the Limitation Act. I express no opinion as to whether the agreement was within s. 257A. I would dismiss this appeal with costs.

STRAIGHT, J.—In my opinion the order of the Mainpuri Court of the 11th June 1885, granting the application of the decree-holder, was not an order sanctioning the agreement of the 12th June 1882. Consequently, I am of opinion that any alteration that could, under the law, have been introduced into the decree of the 5th June 1871, by such an agreement as that upon which the decree-holder relies, was in fact never imported into the decree, and that it remained a decree for a specific sum of money executable in the ordinary way that such a decree should be executed. I think that the language of s. 257A, especially the last paragraph, prohibits the notion that such an agreement as was said to have been entered into here between the decree-holder and the judgment-debtor can be sanctioned three years after the date when it is said to have commenced to have effect, and when money has been paid under it and a default is said to have taken place. If that be a correct view of the order of the 11th June 1885, the decree of the 5th June 1871 stands

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untouched and unaltered. An application to execute it has been made since Act XIV of 1882 came into operation, and has been granted. Therefore that decree is now dead by the operation of s. 230 of the Code of Civil Procedure. I agree in dismissing the appeal with costs.

Appeal dismissed.

1890. *May 7.*

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

RAM LAL AND OTHERS (DEFENDANTS) *v.* CHHAB NATH (PLAINTIFF).*

Res judicata—Civil Procedure Code, s. 13—Cross-appeals—Finding in appeal first heard barring trial of same issue in appeal subsequently heard.

The plaintiff and defendant in a suit each appealed separately, and the defendant's appeal first came on for hearing, and an issue as to whether the plaintiff or the defendant had title to the land in dispute was decided on the facts by the appellate Court adversely to the defendant. Subsequently, the plaintiff's appeal, involving the same issue, came on for hearing before the same Court.

Held that although s. 13 of the Civil Procedure Code did not apply, still the principle of *res judicata* applied, and the finding on the former appeal barred the trial of the same issue in the latter. *Ram Kirpal* v. *Rup Kuari* (1) referred to.

The facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

EDGE, C. J., and BRODHURST, J.—In the lower appellate Court the plaintiff in the suit filed an appeal. The defendants filed another appeal. The defendants' appeal was heard by Munshi Kashi Prasad, who was Subordinate Judge of Cawnpore, on the 13th February 1888. In that appeal the defendants raised the question as to the title of the plaintiff and as to their own title to the land in dispute. The issues in appeal as to the title were found on the facts against the defendants, that is, in that appeal the then Subordinate Judge found that the plaintiff had title and the defendants

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* Second appeal No. 788 of 1888 from a decree of Munshi Piare Lal, Subordinate Judge of Cawnpore, dated the 8th March 1888, reversing a decree of the Munsif of Fatehpur, dated the 4th September 1886.

(1) L. R., 11 I. A., 37. I. L. R., 6 All., 269.

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none. The plaintiff's appeal came on to be heard subsequently before Munshi Piare Lal as Officiating Subordinate Judge of Cawnpore on the 8th March 1888, and he, treating the findings in the other appeal as operating as *res judicata*, decreed the plaintiff's appeal with costs. The appeal now before us is an appeal from the decree of Munshi Piare Lal. It appears to us that he took a correct view of the law, and although s. 13 would not apply, still the principle of *res judicata* applied. S. 13 of the Code is not exhaustive, as was pointed by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1). We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

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HARAKH (DECREE-HOLDER) *v.* RAM SARUP (JUDGMENT-DEBTOR).*

Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Second Appeal—Transfer of decree—Civil Procedure Code, ss. 223, 228, 586.

Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. *Nazar Husain* v. *Kesri Mal* (2) approved.

THE facts of this case, so far as they are necessary, appear from the judgment of Edge, C. J.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

EDGE, C. J.—This is an appeal from an order passed in execution proceedings held under a decree which was made by the Court of Small Causes at Mirzapur. After the decree was made the execution proceedings were transferred to the Court of the Munsif of Mirzapur, and it was in those proceedings that an order was made which was appealed against to the District Judge of Mirzapur, against whose order in appeal this appeal has been brought. If this

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* Second appeal No. 380 of 1887 from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 16th December 1886, reversing a decree of Munshi Shankar Lal, Munsif of Mirzapur, dated the 18th September 1886.

(1) L. R., 11 I. A., 37. (2) *Post*, p. 581.

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appeal lies, it is a second appeal within the meaning of Chapter XLII of the Code of Civil Procedure. Now the suit in question, as I have said, was brought in the Court of Small Causes, being of the nature cognizable by such a Court. The subject-matter of the suit did not exceed Rs. 500. Mr. *Kashi Prasad* for the respondents here has objected that s. 586 of the Code of Civil Procedure applies, and that the appeal does not lie. On the other hand, Pandit *Sundar Lal* for the appellant has contended that the decree having been transferred to the Munsif's Court, and the original order which has led to these appeals having been made by the Munsif, we must treat the case as if the original suit was not of the nature cognizable in a Court of Small Causes; that is the argument which he bases on s. 228 of the Code of Civil Procedure. My brother Mahmood only this morning delivered a judgment the principle of which is applicable to this case. We must see, in my opinion, whether the suit was of the nature cognizable by the Court of Small Causes, and whether the amount or value of the subject of that suit did or did not exceed Rs. 500. In my opinion my brother Mahmood was right. S. 586 prohibits a second appeal in the execution of a decree in a suit referred to in s. 586, just as much as it prohibits a second appeal from the decree in that suit. I cannot read s. 228 as Pandit *Sundar Lal* reads it. It would, in my opinion, be an absurdity to hold that the decree in a Small Cause Court suit passed by a Court of Small Causes must, after it has been transferred to a Munsif's Court for execution, be regarded as a decree in a suit which was not of the nature of suits cognizable in a Court of Small Causes. I am opinion that this appeal does not lie, and that it should be dismissed with costs.

MAHMOOD, J.—I am entirely of the same opinion. The difficulties which arose in my mind were stated by me in my order of the 9th August 1888, whereby this case was referred to a Bench of two Judges. The learned Chief Justice has already referred to the judgment which was delivered by me this morning in the case of *Nazar Husain* v. *Kesri Mal* (1), and the reasons which I gave

(1) *Post*, p. 581.

there are in full accordance with the view expressed by the learned Chief Justice in this case. The appeal, therefore, did not lie on account of the nature of the original suit falling within the purview of s. 586 of the Code of Civil Procedure. The transfer of a decree under s. 223 of the Code could not alter the nature of the suit, nor is there anything in s. 228 to render a decree or an order passed in execution thereof of a different nature to what it was before the transfer. The learned Chief Justice's order dismissing the appeal is therefore the only one which could be passed.

Appeal dismissed.

REVISIONAL CIVIL.

1890. *July*. 5

Before Mr. Justice Mahmood.

NAZAR HUSAIN (PETITIONER) *v.* KESRI MAL (OPPOSITE PARTY).*

Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Second appeal—Civil Procedure Code, ss. 584, 586.

For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed.

Therefore where execution was applied for in the Munsif's Court in respect of a sum of Rs. 422-14-0, the value of the matter in dispute in the original suit (which was of the nature cognizable by a Court of Small Causes) having been above Rs. 500, and, the Munsif's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court:—

Held that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge.

The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Mr. *A. Strachey* and Maulvi *Ghulam Mujtaba*, for the petitioner.

Pandit *Sundar Lal*, for the opposite party.

MAHMOOD, J.—This is an application for revision under s. 622 of the Code of Civil Procedure, and upon its being called on for hearing, Pandit *Sundar Lal*, for the opposite party, has taken a

* Miscellaneous application under s. 622 of the Civil Procedure Code.

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preliminary objection to the effect that no such application is entertainable, as an appeal lay in the case. The facts upon which this objection proceeds are the following :—

On the 14th July 1885, Narotam Das, whom the opposite party, Kesri Mal, represents, obtained a simple money decree for Rs. 650 against the petitioner Nazar Husain, and in execution thereof on various occasions he obtained partial satisfaction of the decree in the Court of the Munsif executing the decree.

The present litigation began with an application made by the decree-holder to the Munsif's Court on the 24th November 1887, for execution of the decree to realize the balance of Rs. 422-14-0. The judgment-debtor raised objections to the execution, but these were disallowed by the Munsif by his order of the 27th April 1889, which was upheld in appeal by the District Judge on the 14th August 1889.

The object of the present application for revision is to set aside the orders of both the lower Courts whereby the execution of the decree was allowed.

Pandit *Sundar Lal* for the decree-holder, opposite party, argues that inasmuch as the amount of the original suit in which the decree of the 14th July 1885 was passed exceeded Rs. 500, it did not fall within the prohibition of s. 586 of the Civil Procedure Code and was capable of being made the subject of a second appeal under s. 584 of the Code, and that for the same reason the decree passed in the suit when put into execution would furnish the test as to the appealability of the orders passed in execution. In other words, the learned Pandit's contention is that a second appeal lay from the District Judge's order of 14th August 1889, which forms the subject of this application for revision, and that therefore this application cannot be entertained under s. 622, which is limited to cases in which no appeal lies to the High Court.

On the other hand, Mr. *Ghulam Mujtaba*, for the judgment-debtor, petitioner, argues that the present being an execution case, s. 647 of the Civil Procedure Code applies, and must be read with

s. 586 for determining whether a second appeal lay in this case. The learned pleader contends that the effect of reading the two sections together is, that in s. 586 the word "suit" must be taken to mean an "application for execution," and that, since in this case the nature of the application was of the Small Cause Court type, and the amount of the money sought to be realized by execution did not exceed Rs. 500, no second appeal could lie, and the only remedy of the petitioner lay in applying for revision under s. 622 of the Code.

I am of opinion that this contention is unsound. It is, no doubt, true that s. 647 of the Civil Procedure Code renders the procedure therein prescribed generally applicable to proceedings in execution of decrees, but such general application of the procedure is qualified by the important clause "as far as it can be made applicable," and there is enough in s. 586 to show that the word "suit" as it occurs there cannot be read to mean application for execution of decree. The suits contemplated there are described to be "of the nature cognizable in Courts of Small Causes." Now, neither the old Small Cause Courts Act (XI of 1865) nor the present Act (IX of 1887) contains any specification of the nature of "applications" cognizable by such Courts, and therefore the word "suit" in s. 586 cannot be read as "application."

It has been suggested that the result of this view would be to hold that s. 586 of the Code is no bar to second appeals even in cases where the decree itself amounts to less than Rs. 500, and was passed in a suit of the Small Cause Court type of less than that value. But I do not think such is the result of my view of s. 586. In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1) the Lords of the Privy Council observed: "It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained." Bearing this general principle in mind, there is no necessity for reading the word "suit" in s. 586 of the Code as if it meant application for execution or indeed any other application. Such applications are

(1) L. R., 8 I. A., 123, I L. R., 8 Calc., 51.

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applications in the suit in which the decree was passed, and the provisions of s. 586 restricting the right of second appeal are as much applicable to such applications as they are applicable to the decrees passed in the class of suits mentioned in that section.

This being so, the turning point of the decision of this case is, what is the real test of appellate jurisdiction with reference to the amount or value of the appeal?

The matter was originally regulated by s. 4 of Act XXXV of 1867, which was replaced by s. 18 of Act XVI of 1868, which was re-enacted in s. 22 of Act VI of 1871 and has since been reproduced as s. 21 of the present Civil Courts Act (XII of 1887). The provisions of these various enactments need not be considered in detail, because upon the exact point now under consideration they do not seem to have altered the law, and I say so with especial reference to the principle of reported rulings.

In the case of *Duli Chand* v. *Nirban Singh* (1) a Full Bench of the Calcutta High Court held that where an original suit is brought for a sum exceeding Rs. 5,000 or for property exceeding that value, and the decree is for a less sum or for property of less than that value, the appeal according to s. 22, Act VI of 1871, will be to the High Court. That was a case of an appeal from a decree in a regular suit, and Couch, C. J., in delivering his judgment made observations which in principle are applicable to this case.

He said :—"The appeal is only a stage of the suit, it is not a fresh suit, but a part of the proceedings in the suit, and therefore, ordinarily, I should say that with regard to the jurisdiction in appeals from decrees and orders of the District and Subordinate Judges, the expression 'the subject-matter in dispute' would mean the subject-matter in dispute in the suit itself, unless, of course, a contrary intention appeared, as in appeals to the Privy Council, where the language is 'the subject-matter in dispute in the appeal.'"

The rule thus laid down by the Calcutta High Court with reference to appeals from decrees in regular suits was extended by a

(1) 9 B. L. R., 190; 18 W. R., 262.

Full Bench of this Court to appeals from orders in execution of decrees. The case is *Mahomed Hossein Khan* v. *Shib Dyal* (1) where it was laid down that when the matter in dispute in an original suit heard by a Subordinate Judge exceeds Rs. 5,000 in value, the appeal against an order passed in execution of decree in which the matter in dispute is less than that amount lies to the High Court and not to the District Court. The converse of this rule was laid down by a Division Bench of this Court in *Chanderbhan Singh* v. *Mahunt Jai Ram Geer* (2) where it was laid down that the appeal against an order of a Subordinate Judge passed in execution of decree where, although the value of the property in dispute exceeds Rs. 5,000, yet the matter in dispute in the original suit was below that amount, lies to the District Court and not to the High Court.

Upon the same principle the Calcutta High Court in *Roy Dhunput Singh Bahadur* v. *Modhoo Mote Dabia* (3) held that in determining the venue of appeal against an order passed in execution, the "subject-matter in dispute" used in s. 22, Act VI of 1871, must be taken to exclude the interest which accrued subsequently to the date of the decree. The question was more fully considered in *Musammat Ruttunjote Koer* v. *Ram Doss* (4) where the general principle was laid down that when the decree or order, which is the subject of appeal, is made in a suit, whether during the execution proceedings or previously, the subject-matter in dispute within the meaning of Act VI of 1871, s. 22 is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect. In delivering the judgment of the Court, Phear, J., observed, "Babu *Romesh Chunder Mitter* has urged upon us with much force that the subject-matter in dispute between the parties to this appeal is the amount which is at this time due under the decree, and which will be levied against one of them if the order of the Subordinate Judge, now appealed against, is allowed to have force. It appears to us, however, that when the decree or order which is the subject of appeal is a decree or order made in a suit,

(1) N.-W. P. H. C. Rep., 1873, p. 108.
(2) N.-W. P. H. C. Rep., 1873, p. 175.
(3) 18 W. R., 316.
(4) 19 W. R., 131.

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whether during the execution proceedings or previously thereto, the subject-matter in dispute within the meaning of this section is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect." The learned Judge then, after referring to the Full Bench ruling of the Court in 9 B. L. R., 190, went on to say :—" It appears to us that if we put any other construction than that which we have mentioned upon the words, we should make the section have an operation which could not have been contemplated by the Legislature, for it would cause the appeal to shift from one Court to the other, merely by such lapse of time as would suffice to make an amount which when decreed fell below Rs. 5,000, grow by the increment of the interest to a sum above Rs. 5,000."

I agree in these observations, and I think they are applicable in principle to this case. The broad principle expressed in these various rulings is that for purposes of determining the venue of an appeal, whether from a decree in a regular suit, or from an order passed in execution of such decree, the test of pecuniary jurisdiction is the valuation of the original suit in which the decree was passed —*vide Jag Lal* v. *Har Narain Singh* (7). If such were not the case anomalies and inconveniences even more serious than those contemplated by Phear, J., would ensue in respect of the venue of appeals from orders other than those passed in execution of decrees, that is, orders appealable under s. 588 of the Code. The valuation of the original suit must therefore be the test for determining the question of appellate jurisdiction, and the principle is clearly recognized by the present Civil Courts Acts (XII of 1887), s. 21 of which provides that " appeals from a decree or order of the Subordinate Judge shall lie to the District Judge, where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed four thousand rupees, and to the High Court in any other case."

Now, in the present case, it is true that the suit which ended in the simple money decree of 14th July 1885, was of the nature

(7) I. L. R., 10 All., 524.

cognizable in the Court of Small Causes, but in point of value it exceeded Rs. 500. It was therefore not a suit within the restriction as to second appeals contained in s. 586 of the Civil Procedure Code. It is true that the application for execution dated the 24th November 1887, with which this litigation began, related only to Rs 422-14-0, that is an amount below Rs. 500, but, as I have already said, an execution proceeding must for purposes of jurisdiction as to appeals be taken to be regulated by the valuation of the original suit, and it follows that if a second appeal would lie from the decree in the original suit, a second appeal will lie also from an order passed in execution of such decree, whether such execution related to a sum above Rs. 500 or below that amount.

The result of this view is to hold that the order of the District Judge, dated the 14th August 1889, impugned by this application for revision, might have been made the subject of a second appeal, since it was passed in a suit to which the prohibition of s. 586 is not applicable. This being so, no application for revision is entertainable under s. 622 of the Code, as that section is limited to cases in which no appeal lies to the High Court.

For these reasons the preliminary objection taken by Pandit *Sundar Lal* on behalf of the decree-holder prevails, and I dismiss this application with costs.

Appeal dismissed.

PRIVY COUNCIL.

J. C.
P. C.
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July 9.

MAINA AND OTHERS (DEFENDANTS) *v* BRIJMOHUN AND OTHERS (PLAINTIFFS).

[On appeal from the High Court for the North-Western Provinces.]

Act I *of* 1877 (*Specific Relief Act*) *s.* 42—*Refusal of declaratory decree, the case made for it being defective.*

Under the Specific Relief Act (I of 1877) s. 42, a suit was brought for a decree declaratory of the plaintiffs' title to be mutawalis and managers of property from ancient times connected with religious observances, *viz.*, a ghát upon the Jumna with temples adjoining; of their title also to receive a proportion of the offerings; and they also claimed to have the proceeds of a decree obtained by the defendants against a third party spent upon repairs.

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Held that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had, nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to have, relating to the property.

Appeal from a decree (5th January 1887) reversing a decree (30th June 1885) of the Subordinate Judge of Agra.

The respondents, who were plaintiffs, alleged themselves as representing the Sannadhia Brahmans in Mathra, while the defendants were at the head of the Mathuri (1) caste, to be entitled, together with the defendants, who were not solely entitled, to act as mutawalis and managers of the Bisram ghát upon the bank of the Jumna, and of the temples attached, receiving the offerings made by jattris or pilgrims, their shares being in the proportion of two-thirds to the defendants and one-third to the plaintiffs, with reference to the number of houses in Mathra occupied by the Sannadhias and Mathuris, respectively. This claim was valued at Rs. 17,000. They also claimed that a sum of Rs. 400 should be set apart by the defendants for the repairs of the ghát, this being the amount of a decree for money obtained on behalf of the institution.

The defendants, denying the claim, alleged that the plaintiffs and all Sannadhias, used another ghát, the Swami, not assembling at Bisram ghát. The plaintiffs were not Chaubes. This defence was, in effect, accepted by the Subordinate Judge, who inspected the locality, and observed that the differences between the castes were such that it was improbable that they would conduct their ceremonies in the same place.

This judgment was reversed by a Division Bench of the High Court (STRAIGHT and TYRRELL, JJ.,) and a declaratory decree was made in favour of the plaintiffs.

The order referred to as supporting the assertions on behalf of the plaintiffs, purported to have been issued by "Muhammad Furrukh Shah, the king of the Ghazis, to the Darogha of the

(1) As to these castes, see Sir H. Elliott's Races of the N.-W. P., edited by J. Beames, Esq., appendix, pp. 308, 319, 329.

nazúl lands appointed by the Government at Agra." It, apparently, had no date upon it; and the translation of it on the record was :—

"On a petition being presented by Sobha Ram, Brahman, resident of Mathra, Islamabad, we have been informed that Bisram ghát, on the banks of the river Jumna, together with the thakurdwaras (temples) built by Rájas and Sahukars at the said Islamabad, have been the places of worship of the Hindus since ancient time, and the Mathuria and Sannadhia Brahmans receive alms at those places, whereby they support themselves; that we have ascertained this after inquiry, therefore you are hereby commanded not to interfere with the thakurdwara buildings, which are the places of pilgrimage, by the order of the Kings, but to leave the same in the enjoyment of the Brahmans. You are enjoined strictly in this matter."

The Judges held it clear "from the photograph which is before us and the accuracy of which is not questioned, that in order to enable the plaintiffs to use these temples which are ancient buildings, they must have constantly and uninterruptedly from time immemorial used the ghát and the steps adjacent thereto. But the plaintiffs claimed something more than a mere right to pass and repass over the ghát and the steps, and they say that as Sannadhia Brahmans and a section of the Chaube class, they are entitled to use and enjoy the ghát in the same way as the Mathuria Brahmans in connection with the jijmans, who, on sacred occasions, come there and use the ghát for religious ceremonies. In support of their case they produced a firman of the Emperor Furrukh Shah and oral evidence of witnesses which go to support their assertions, and it seems to be virtually conceded that if they do belong to the Chaube sect, they are entitled in respect to the ghát to enjoy the privileges and rights of the respondents of the Chaube community concerned therein."

Mr. *C. W. Arathoon*, for the appellants, argued that the evidence had not supported the statements in the plaint; and the rights, if any were proved, were so indefinite that no decree declaring them should have been made.

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The respondents did not appear.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

SIR BARNES PEACOCK.—This was a suit brought by the respondents and another for a decree declaratory of their right in a ghát, and also for certain relief specified in their plaint. The suit is governed by Act 1 of 1877, the 42nd section of which deals with declaratory decrees. By that section it is enacted that "any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right; and the Court may in its discretion make therein a declaration that he is so entitled; and the plaintiff need not in such suit ask for any further relief. Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The plaintiffs, representing the body of a sect called Sannadhias, set out in their plaint what they considered to be the rights of that sect, and they stated therein their grounds for asking for a declaratory decree. They say: "That Bindraban Das, when he was alive, laid out Rs. 100 in the repairs of the ghát. He died at Mathra on or about the 5th of October 1879. When he was alive he deposited Rs. 900 with Bhagwan Das, with instructions to use the money in the repairs of the Bisram ghát, and Bhagwan Das having failed to use the money in the repairs of the ghát, Panna, deceased, the father of Madan, defendant, and Chatrban, defendant, instituted a suit without joining plaintiffs, and with a view of depriving them of their right, in the Munsif's Court at Mathra for Rs. 1,000, on declaration that they alone were the mutawallis (managers), and under a fictitious deed of compromise obtained a collusive decree on 21st December 1882. Through collusion they had it recorded in the deed of compromise that Rs. 600 had been laid out in the repairs, and with reference to the balance of Rs. 400 a payment by instalments of Rs. 80 a year had been agreed, and the application filed by the plaintiffs in the Munsif's Court at Mathra, praying to be joined as a party, was

disallowed on 14th September 1883." That was one of their grounds for asking the Court to exercise its discretion in making a declaratory decree. The next ground was: "That a fictitious suit was instituted by Changaji and others, against Panna and others, defendants, in this Court, and plaintiffs filed an application in this Court, also praying to be joined as a party under s. 32 of the Civil Procedure Code; but the said application was disallowed on 3rd July 1883, and plaintiffs were not joined as a party. That all the defendants to this suit have colluded with one another, and have taken collusive proceedings in the Munsif's Court at Mathra, and in this Court, with a view of depriving plaintiffs of their right. They declare themselves to be the owners, and deny plaintiffs' right; hence the cause of action arose on 11th August 1882, the date of the institution of the suit in the Munsif's Court at Mathra, and on 14th February 1883, the date of the institution of the suit in this Court at Agra." They then stated what the relief was which they sought, and they prayed judgment for "a decree for the declaration of the plaintiffs' right as mutawali and manager of the Bisram ghát, and all the temples attached to the same, to the extent of one-third, be passed in favour of the plaintiff as head of the Sannadhias against his brother Sannadhias" and that it might be likewise declared in the said decree that "defendants alone were not owners and mutawallis of the said ghát." It appears to their Lordships that the plaintiffs have made no case. They have not proved that they were entitled as mutawallis and managers of the Bisram ghát to one third of the offerings made by their followers, and they could not be entitled to have a declaration that the defendants were not the sole owners, unless they could prove a right on their parts to be part owners. Having asked for a declaratory decree, they go on in pursuance of the Relief Act to allege that "the collusive decree obtained by the defendants from the Munsif's Court at Muthra against Bhagwan Das, for which defendants have declared themselves liable under the Deed of Compromise, having been set aside, its amount be recovered from the defendants, and it be used in the repairs of the Bisram ghát, either with the consent and management of the parties or through an official of the Court."

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There were many witnesses examined, and considerable discrepancies in the evidence given. The first Court laid down certain issues, the fourth issue being "Are the plaintiffs guardians of Bisram ghát, vested with a right to receive the offerings made in it, to superintend the repairs and erection of the building there, or are they priests at Swami ghát, plying their professional duty there?" It might be that they were priests of Swami ghát, and yet might also have an interest in Bisram ghát. The whole point of the issue is—were they guardians of Bisram ghát, with a right to receive the offerings made in it, and to superintend the repairs and erection of buildings there? The Subordinate Judge delivered judgment, in which he said: "The plaintiffs in this case have no connexion with the Bisram ghát; they are Sannadhia Brahmins, having no concern whatever with the property which was used by the Chaubes as the place of their worship. Bisram ghát, is the worshipping place of the Chaubes, in the vicinity of which the plaintiffs, who are Sannadhias, have their temples. My inspection of the place has fully convinced me of this. The documentary and oral evidence abundantly establish this conclusion to my entire satisfaction. Both sects, the Sannadhias and the Chaubes, are bitter enemies to each other and could not be expected to have a common place for their worship." Having come to that conclusion he dismissed the plaintiffs' suit with costs.

It is not necessary for their Lordships in concurring in the judgment of the Subordinate Judge to agree in all his reasons. It is quite consistent with the decree which he passed dismissing the suit that the plaintiffs may have some right in Bisram ghát; but they have not proved any right to have it declared that they are entitled as mutawallís to have an interest to the extent of one-third of the offerings. The Subordinate Judge dealt with the evidence in the most general terms. He did not allude to any particular witness or any particular document, but he said: "I think the plaintiffs have not made out their case."

The High Court dealt with the case in the same general terms. The Subordinate Judge had heard the witnesses. He had better

opportunities of judging of the evidence, and of the several discrepancies, than the High Court, who did not hear the witnesses or see their demeanour. The High Court did not decide whether the plaintiffs were the mutawallis, entitled to one-third, but they said: "In support of their case they produced a *firman* of the Emperor Furrukh Shah." It appears to their Lordships that that firman, as it is called, did not vest any right in either party, and is not a document which can be held to support the case either of the one side or of the other, but the High Court attached some importance to it. The judgment continues: "The plaintiffs produced oral evidence of witnesses which go to support their assertions; and it seems to be virtually conceded that if they do belong to the Chaube sect they are entitled in respect to the ghát to enjoy the privileges and rights of the Chaube community concerned therein." The learned Judge who delivered the judgment then proceeds: "It seems to me to be established beyond question that they do belong to the Chaube class, and no evidence is shown to us on behalf of the respondents to contradict that produced by the appellants. This being so, and taking all the circumstances of the case into consideration, I think the plaintiffs appellants are entitled to the same decree as that granted to the plaintiffs appellants in F.A. No. 172 of 1885, decided this day,"—referring to another suit. Their Lordships see nothing on the record to show that there was any concession by the defendants of the kind indicated by the High Court. The decree which follows is not confined merely to the order expressed in the judgment. It proceeds: "It is ordered and decreed that this appeal be decreed; that the decree of the Subordinate Judge of Agra be set aside, and in lieu thereof it is hereby declared that the plaintiffs appellants aforesaid are entitled to have, exercise, and enjoy, all rights of care, use, and management of the Bisram ghát, and the buildings appertaining thereto, situated on the bank of the river Jumna, in the city of Mathra, and in connexion with the expenditure of the sum of Rs. 1,000 bequeathed by the late Brindaban Das Khettri for the repairs of the said ghát, so far as the same have not yet been expended as declared by the deceased Brindaban Das."

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If their Lordships considered that the judgment of the High Court ought to be affirmed, it would be necessary to state in what manner that decree should be altered; but their Lordships are of opinion that the judgment of the High Court has gone upon a wrong principle, it merely stating that if the plaintiffs belonged to the Chaube class they were entitled to all they claimed, and that they did belong to the Chaube class.

It appears to their Lordships that the learned Judges of the High Court have not sufficiently kept in view the only real question raised in this case, namely, whether the plaintiffs have proved that they, as mutawallis or managers of the Bisram ghát, are entitled to one-third of the donations given by the pilgrims to that ghát, and also that the suits referred to were fictitious? In their Lordships' opinion the plaintiffs have not made out a case for the declaratory decree which they claimed, and certainly they have not made out a right to have the decree obtained by the defendants from the Munsif's Court, at Mathra, against Bhagwan Das, set aside, and to have the amount recovered from the defendants in that suit used in the repairs of the Bisram ghát.

Their Lordships think, therefore, that the decree of the High Court ought to be reversed, and the decree of the Subordinate Judge affirmed; but holding that the plaintiffs are not entitled to the right claimed or to the relief sought, their Lordships wish it to be distinctly understood that they do not express any opinion with respect to any other rights, if any, which either of the parties to the suit may have or claim to have in the aforesaid Bisram ghát.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the Subordinate Judge, and to order the respondents to pay the costs in the High Court. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant:—Messrs. *T. L. Wilson and Co.*

APPELLATE CRIMINAL.

1890
July 26.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Young.

QUEEN-EMPRESS *v.* SUNDAR SINGH AND OTHERS.

Act I of 1872 (*Evidence Act*) *ss.* 74, 80—*Presumptions in respect of record of foreign Court—Confession made before, and attested by, a judicial officer in a Native State, how far admissible as evidence in the Courts of British India.*

Certain persons charged with a dakaiti committed at Chawripura, a village on the borders of Gwalior, having gone over into Gwalior territory, were arrested and brought before the Magistrate of Bhind in Gwalior. That officer recorded their statements, attesting each statement in the following words :—

"I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it, having heard it read out to him, stated it as correct. It contains a full and true account of the satement made by him."

Each statement also bore the mark (by way of signature) of the person by whom it purported to have been made.

Subsequently these persons were handed over to the British authorities and were tried by the Court of Session, who rejected the confessions above referred to as inadmissible in evidence. The accused having appealed to the High Court, it was held that each of the confessions recorded in the manner above described was admissible in evidence, certainly under s. 80 of the Evidence Act, and probably under s. 74 of that Act, as against the person by whom it was made.

The facts of this case are sufficiently stated in the head-note and in the judgment of the Court.

Mr. *J. Simeon,* for the appellants.

The Public Prosecutor (Mr. *C. Dillon*) for the Crown.

EDGE, C. J., and YOUNG, J.—Sundar Singh, Bakhtawar Singh, Darwa and Umrao were convicted under s. 396 of the Indian Penal Code. Sundar Singh was sentenced to death, the other three to transportation for life. They have appealed. On the hearing of the appeals Mr. *Simeon* appeared for Sundar Singh and Bhakhtawar Singh; the other two men were unrepresented. We have heard the appeals together, and, as it was really one case, we dispose of them by one judgment. There are some points which are beyond dispute. One is that a very daring dakaiti was

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perpetrated on the 25th November 1889 at the village Chawripura. Chawripura is partly in Gwalior and partly in British territory. The offences of which these men have been convicted were committed within British territory. Another point which is beyond dispute is that on that occasion some of the dakaits were armed with guns, and shots were fired by some of the dakaits, the result being that one villager was killed and another severely wounded. The latter died subsequently from pneumonia. The only question in this case is the question of identity. If these men were jointly committing the dakaiti, there cannot be a question that they were properly convicted under s. 396. We shall deal with the case of each of these men separately; but before doing so it is necessary that we should decide as to whether certain statements or confessions which were made by Bakhtawar Singh, Darwa and Umrao, respectively, before the Magistrate of Bhind, which is in Gwalior territory, are admissible in evidence in this case. There is no doubt that the Magistrate of Bhind was a judicial officer of the State of Gwalior. We have equally no doubt that he did in fact take down these confessions or statements with his own hand and that they were not, as the Sessions Judge appeared to think, mere reproductions of forms of confession prepared by the police. Each statement bears at the foot of it the following certificate with the hand of the Magistrate of Bhind :—" I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it having heard it read out to him stated it as correct. It contains a full and true account of the statement made by him." We must presume till the contrary is shown that that certificate correctly states the facts; further, these statements bear internal evidence that they were the result, to some extent at any rate, of questions put by the Magistrate of Bhind to the person making each statement. They show that questions were put by the Magistrate of Bhind, and, judging by what was stated in answer to his questions, many of them of those questions were very pertinent. Further, those statements are in very considerable detail and are corroborated by the evidence in the case. Each of the men who made a confession put his mark by way of signature to his confes-

sion. We must presume that those confessions are the genuine records of the confessions actually made before the Magistrate of Bhind, and we are of opinion that they were made at the time when the police, in whose custody these men had been, were not actually present. It appears to us that they would be admissible, certainly under s. 80 of the Evidence Act, probably under s. 74 of that Act, and that there is nothing in law to prevent a confession being proved, no matter when or where made, against the man who made it, provided it was not made under circumstances which by our Codes would render it inadmissible. We are of opinion that the record of each of the confessions, signed as it was by the person who made it, is admissible as against him. We do not propose to use the confession of one man as against another, so accordingly we need not decide whether the confession of one man would be admissible against the others.

[The Court proceeded to examine the evidence in the three cases, and in the result dismissed the appeals and confirmed the convictions and sentences.]

Appeals dismissed.

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ACTS—1850—XVIII. *Judicial officers, liability of—Judicial act within the limits of the officer's jurisdiction—Such act protected though done erroneously, illegally or not in good faith—"Jurisdiction."*] Under Act XVIII of 1850, where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly or even illegally or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it.

The word "jurisdiction" is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder* v. *Halket*. It means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. A judicial officer who in the discharge of his judicial duties issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction in this sense.

Where a Magistrate of the first class having sentenced an accused person to three years' rigorous imprisonment and Rs. 500 fine under ss. 379 and 411 of the Penal Code, and having issued a warrant purporting to act under s. 386 of the Criminal Procedure Code, for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, schedule V and s. 554 of the Code, and Form D in Chapter V of the Circular Orders of the High Court,—*held* that he was acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that, under such circumstances, it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850.

Teyen *v.* Ram Lal 115

———1860—XLV, s. 154. *Liability of owner or occupier of land on which an unlawful assembly is held*]. It is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that he should be aware of the likelihood of such an occurrence. That his karinda should have taken an active part in the riot is sufficient to warrant the conviction of the owner, under s. 154 of the Penal Code.

Queen-Empress *v.* Payag Singh 550

———————, s. 212. *Harbouring an offender.*] To justify a conviction under s. 212 of the Penal Code, it is necessary that there should

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be an offence committed, and consequently an offender who has been harboured or concealed. *Empress* v. *Abdul Kadir* referred to.

Queen-Empress *v.* Fateh Singh 432

ACTS—1861—IX, *ss.* 1, 3, 4. *See* Minor *and* Civil Procedure Code, s. 17.
————1870—VII, ss. 4, 5, 6, 9, 10, 11, 12, 28, 30. *See* Court-fee.

————————, ss. 6, 28, SCH. I, NOS. 4, 5. *Review of judgment—Act XV of* 1877, *s.* 5, *sch. ii, No.* 172—*Application insufficiently stamped —Sufficient cause for admitting application after period prescribed —Presentation of application to Munsarim instead of Judge.*] On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped, and the Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April 1889, the deficiency pointed out by the Munsarim was made good. On the 26th May the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after ninety days from the date of the decree.

Held that s. 6 and the first paragraph of s. 28 of the Court-fees Act (VII of 1870) were applicable; that there was no mistake or inadvertence within the meaning of the second paragraph of s. 28; that the Judge had no power under the circumstances to admit the application as one presented after ninety days from the date of the decree; that there was no presentation within ninety days of an application which could have been received; that no sufficient cause had been shown, within the meaning of s. 5 of the Limitation Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected.

Held also that the application should have been presented to the Judge, and not to the Munsarim.

Munro *v.* The Cawnpore Municipal Board 57

————1871—VI, s. 20. "*Subject-matter in dispute*"—*Jurisdiction of Munsif—Claim for partition of share less than Rs.* 1,000 *in family property exceeding Rs.* 1,000.] In a suit instituted in the Court of a Munsif by a member of a Muhammadan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs. 1,000, and the value of the whole family property exceeded Rs 1,000. The lower appellate Court decreed partition not only of the plaintiff's share, but also of the shares of the defendants *inter se*, though such partition was not asked for.

Held that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871) was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Vydinatha* v. *Subramanaya*, *Kirty Churn Mitter* v. *Aunath Deb*, *Shaikh Kloorshed Hossein* v. *Nubbee Fatima*, and *Ram Chandra Narayan* v. *Narayan Mahadev*, distinguished.

Hikmat Ali *v.* Wali-un-nissa 506

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ACTS—1872—I, ss. 8, 9, 13, 40, 43.—*Admissibility in evidence of judgments not* inter partes—*Judgment in criminal case.*] *P* brought a suit against *K*, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to *K's* husband, and to have it declared that her husband died childless, and that *K* had falsely put forward a child of unknown parentage as her husband's son. *K* was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance, and by the High Court on appeal. After *K's* death *P* brought a suit against *D*, whom the Collector as Manager of the Court of Wards had accepted as the minor son of *K*, and against the Collector as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit.

Held by the Full Bench that the judgments of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (BRODHURST, J., dissenting on this point) that they were admissible in evidence in the present suit.

Per EDGE, C.J., and TYRRELL, J.—The judgments were not admissible under s. 8 or s. 9 of the Evidence Act (I of 1872), nor was either of them a "transaction" or a "fact" within the meaning of s. 13. But the record, and not the judgments alone, in the former suit, was admissible under s 13 (*b*), independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed, the word "right" in both clauses (*a*) and (*b*) of s. 13 including a right of ownership, and not being confined, as held by the majority in *Gujju Lall* v. *Fatteh Lall*, to incorporeal rights. But the reasons given in the judgments in the former suit for the decree could not be considered in the present suit.

Per STRAIGHT, J.—Under s. 43 of the Evidence Act the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provision of the Act. Here the question was not as to the *existence* of the former judgments and decrees as a fact in issue or relevant fact; but though s. 43 declared judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 irrelevant *quâ* judgments, orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees were not themselves a "transaction" or "instances" within the meaning of s. 13; but the suit in which they were made was a transaction or an instance in which the defendant's right as the living son of *K's* husband to obtain proprietary possession of his father's estate was claimed and recognised, and to establish that such a transaction or instance took place, they were the best evidence.

Per BRODHURST, J.—That for the reasons given by Garth, C.J., and Jackson and Pontifex, JJ., in *Gujju Lall* v. *Fatteh Lall*, the judgments in the former suit were not admissible in evidence.

Per MAHMOOD, J.—That for the reasons given in the dissentient judgment of Mitter, J., in *Gujju Lall* v. *Fatteh Lall*, the former judgments were admissible in evidence.

It having been alleged that the defendant was in reality one *R*, the defence attempted to use as evidence a judgment in a criminal case in which the defendant was prosecuted as *R* for causing simple hurt, and in which the Court had found that *R* had died some time before the date of the alleged offence, and expressed an opinion that the present plaintiff (who was not the prosecutor) had got up the case.

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Held by EDGE, C.J., and BRODHURST and TYRRELL, JJ., that the judgment of the criminal Court was not admissible in evidence.

Held by STRAIGHT, J., with doubt, and on the principle that in cases of doubt a Judge should decide in favour of admissibility rather than of non-admissibility, that the judgment was a fact which went to establish the identity of the defendant with the person he alleged himself to be, or at any rate to show that he was not the person the plaintiff said he was, and that it was therefore admissible under s. 9 of the Evidence Act.

Held by MAHMOOD, J., that the judgment was admissible under s. 8 and, if not, under other sections of the Evidence Act.

The Collector of Gorakhpur *v.* Palakdhari Singh 1

ACTS—1872—I, ss. 74, 80.—*Presumptions in respect of record of foreign court—Confession made before, and attested by, a judicial officer in a Native State, how far admissible as evidence in the Courts of British India.*] Certain persons charged with a dakaiti committed at Chawripura, a village on the borders of Gwalior, having gone over into Gwalior territory, were arrested and brought before the Magistrate of Bhind in Gwalior. That officer recorded their statements, attesting each statement in the following words:—

"I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it, having heard it read out to him, stated it as correct. It contains a full and true account of the statement made by him."

Each statement also bore the mark (by way of signature) of the person by whom it purported to have been made.

Subsequently these persons were handed over to the British authorities and were tried by the Court of Session, who rejected the confessions above referred to as inadmissible in evidence. The accused having appealed to the High Court, it was held that each of the confessions recorded in the manner above described was admissible in evidence, certainly under s. 80 of the Evidence Act, and probably under s. 74 of that Act, as against the person by whom it was made.

Queen-Empress *v.* Sundar Singh 595

ACTS—1872—I, s. 106. *See* Lambardar and co-sharer.

——————, s. 110. *See* Evidence.

——————, s. 111. *See* Undue influence.

——————IX, s. 29. *See* Mortgage (1).

——————, ss. 201, 218. *See* Act XV of 1877, sch. ii, No. 89.

——————1873—XIX, s. 243. *See* Civil Procedure Code, s. 320.

——————1877—I, s. 39. *See* Undue influence.

——————, s. 42—*Refusal of declaratory decree, the case made for it being defective.*] Under the Specific Relief Act (I of 1877) s. 42, a suit was brought for a decree declaratory of the plaintiffs' title to be mutawalis and managers of property from ancient times connected with religious observances, *viz.*, a ghát upon the Jumna with temples adjoining; of their title also to receive a proportion of the offerings; and they also claimed to have the proceeds of a decree obtained by the defendants against a third party spent upon repairs.

Held that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in

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respect of the property in question, they had, nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to have, relating to the property.

Maina v. Brijmohun 587

ACTS—1877—I, s. 54. *See* Co-sharers.

——————XV, s. 4. *See* Court-fee.

——————, ss. 4, 5, 12. *Civil Procedure Code, ss.* 542, 587—*Court competent to raise question of limitation not raised by the parties—Time requisite for obtaining copy of decree—Exclusion of time between delivery of judgment and signing of decree—Exclusion of time between furnishing of estimate of cost of copy and compliance with estimate.*] Judgment was pronounced by the Court of first instance on the 23rd May 1887. The decree was signed on the 31st May. An application for copies was made by the defendants on the same day. Information of the estimate of the cost of copies was given to them on the 1st June; but they did not comply with that estimate until the 9th June. The copies were delivered on the 11th June. On the 30th June, the defendants filed their memorandum of appeal in the lower appellate Court which, on an office report that it was within time, admitted it, and fixed the 19th August for the hearing. On the 1st August, another office report was submitted, which showed that the appeal was beyond time. Accordingly the Judge on the 2nd August, directed the defendants to be informed that their appeal was dismissed. On the 27th August, however, the defendants presented a petition to the Judge, in consequence of which he readmitted the appeal, and, cancelling his order of the 2nd August, directed that the appeal should be heard.

Held that the appeal was barred by limitation under art. 152, sch. ii of the Limitation Act (XV of 1877).

A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause, within the meaning of s. 5 of the Limitation Act, for the appellant in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal.

S. 5 of the Limitation Act cannot be applied in making the computation of time provided for by s. 12, and does not become applicable until after such computation has been made. *Rái Coomar Roy* v. *Shaikh Mahomed Wais* dissented from.

In computing the time to be excluded under s. 12 of the Limitation Act from a period of limitation, the "time requisite for obtaining a copy" does not not begin until an application for copies has been made. If therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless, an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bani Madhub Mitter* v. *Matungini Dassi* dissented from.

Per Edge, C. J., Brodhurst and Young, JJ.—A Court in computing under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is

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confined to ascertaining for the purposes of such computation the time occupied by the office, after application made, in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who has applied for them.

Per Edge, C. J.—The only section in the Limitation Act which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act, is s. 5.

Per Mahmood J.—Where there is delay in compliance with the estimate which is unavoidable and due to causes beyond the control of the applicant, such delay may be included in "the time requisite for obtaining a copy." Whether or not such delay is unavoidable is a question of fact in each case.

Per Mahmood, J.—A bare mistake of law is not a "sufficient cause" within the meaning of s. 5 of the Limitation Act for extending the period of limitation. *Huro Chunder Roy* v. *Suruamoyi*, dissented from.

Bechi *v.* Ahsan-ullah Khan 461

ACTS—1877—XV, ss. 5, 12, SCH. ii, No. 170. *Application for leave to appeal as a pauper—Civil Procedure Code, ss. 579, 592—Time requisite for obtaining copy of decree—Exclusion of time between delivery of judgment and signing of decree.*] Judgment was pronounced by the lower appellate Court, dismissing the appeal of the plaintiff, on the 29th March, 1887. The decree was signed by the Judge on the 1st April, but, in accordance with s 579 of the Civil Procedure Code, it bore date the day on which the judgment was pronounced On the 15th April the plaintiff applied for a copy of the decree; on the 16th she received notice that the estimate of the costs of preparing the copy was prepared; on the 19th she paid into Court the amount required by the estimate. She had notice to attend on the 23rd for delivery to her of the copy, and on the 25th she attended and received the copy. On the 12th May she presented in the High Court, to the proper officer, an application, under s. 592 of the Code, for leave to appeal as a pauper.

Held that the application was barred by limitation under art. 170, sch. ii, of the Limitation Act (XV of 1877), and that s. 5 of the Act did not apply.

Per Edge, C. J.—In computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the intermediate period should, under s. 12 of the Limitation Act, be excluded if the delay in signing the decree has delayed the appellant or applicant in obtaining a copy of the decree, and not otherwise. *Bani Madhub Mitter* v. *Matangini Dassi* referred to.

A delay caused by the carelessness or negligence of a party applying for copy of decree, such as negligence in coming forward to pay the money required, cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite, within the meaning of s. 12 of the Limitation Act, does not mean requisite by reason of the carelessness or negligence of the applicant: it means the time occupied by the officer who has got to provide the copy, in making the copy. The important date, with reference to s. 12 and art. 170, is not the date when the copy of the decree is delivered,

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but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had notice that the copy will be ready on that date.

Parbati *v.* Bhola 79

ACTS—1877—XV, s. 5, SCH. II, No. 173. *Review of judgment—Act VII of 1870, ss. 6, 28, sch. i, Nos. 4, 5—Application insufficiently stamped—Sufficient cause for admitting application after period prescribed—Presentation of application to Munsarim instead of Judge.*] On the 26th January 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped, and the Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April 1889, the deficiency pointed out by the Munsarim was made good. On the 26th May the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after ninety days from the date of the decree.

Held that s. 6 and the first paragraph of s. 28 of the Court-fees Act (VII of 1870) were applicable; that there was no mistake or inadvertence within the meaning of the second paragraph of s. 28; that the Judge had no power under the circumstances to admit the application as one presented after ninety days from the date of the decree; that there was no presentation within ninety days of an application which could have been received; that no sufficient cause had been shown, within the meaning of s. 5 of the Limitation Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected.

Held also that the application should have been presented to the Judge, and not to the Munsarim.

Munro *v.* The Cawnpore Municipal Board 57

——————, ss. 5, 12. *"Time requisite for obtaining a copy of the decree appealed against"—Neglect of Court officials in issuing copies.*] A decree of a lower appellate Court was passed on the 26th March 1888, and an appeal therefrom was presented to the High Court on the 6th July or twelve days beyond the time allowed by art. 156, sch. ii of the Limitation Act (XV of 1877). An application for a copy of the judgment under appeal was made by the appellants on the 28th March, and the 29th March was fixed by the office as the date when the estimate of the costs of such copy was to be delivered, and it was delivered on that day. The estimate was not complied with until the 5th April when the appellants put in the necessary stamp paper according to the estimate. Upon the entry of the stamp paper no intimation was made by the office to the appellants as to when the copy would be ready for delivery. The copy was delivered on the 10th April.

Held that under s. 12 of the Limitation Act, the appellants were entitled to a deduction of the whole period between the 28th March and the 10th April and that, if this were not so, the appeal should be admitted under s. 5 of the Act.

The words in s. 12, "the time requisite for obtaining a copy of the decree appealed against" imply that the appellant is not to lose his right of appeal by reason of the neglect of the officials who issue copies or who are required to give notice when such copies are ready.

Sheogobind *v.* Abdakhi 105

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ACTS—1877—XV, *s.* 14. "*Other cause of a like nature.*"] The words "other cause of a like nature" in s. 14 of the Limitation Act (XV of 1877) mean some cause analogous to defect of jurisdiction.

Where a suit was dismissed on the ground that the debt sued for was due not to the plaintiff alone, but to the plaintiff and his partner, the latter not having been joined in the suit; and where the plaintiff subsequently brought a fresh suit for the same debt, making his co-partner a party,

Held that the case was not within s. 14 of the Limitation Act, and that the time during which the plaintiff had been prosecuting the former suit could not be excluded in computing the period of limitation prescribed for the second suit. *Ram Subhag Das* v. *Gobind Prasad* and *Chunder Madhub Chuckerbutty* v. *Ram Coomar Chowdry* referred to. *Deo Prasad Singh* v. *Pertab Kairee* not followed.

Jema *v.* Ahmad Ali Khan 207

——————, *sch. ii*, No. 89. *Suit by principal against agent to recover money received and not accounted for—Termination of agency—Act IX of* 1872 (*Contract Act*), *ss.* 201, 218]. Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to ss. 201 and 218 of the Contract Act (IX of 1872), until he has paid the price to the principal: and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of sch. ii, art. 89 of the Limitation Act (XV of 1877): and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendant's breach of duty.

Babu Ram *v.* Ram Dayal 541

——————, Nos. 99, 120, 132. *See* Contribution.

——————, No. 152. *See* ss. 4, 5. 12.

——————, No. 179. *See* Execution of decree (9).

——————, No. 179 (4). *Application "in accordance with law"—Civil Procedure Code, ss.* 325 *(j)*, 341—*Act IV of* 1882, *s.* 99.] The expression "applying in accordance with law" in Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4), means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

Held, therefore that an application to have the judgment-debtor arrested in execution of decree, which was in contravention of the terms of s. 341 of the Civil Procedure Code, and an application to bring mortgaged property to sale, which was in contravention of s. 99 of the Transfer of Property Act (IV of 1882), were not applications "in accordance with law" within the meaning of No. 179 (4) of sch. ii of the Limitation Act.

Chattar *v.* Newal Singh 04

——————, No. 179 (4)— "*Step in aid of execution*"—*Application by decree-holder under Civil Procedure Code, s.* 258.] The expression "step in aid of execution" in Act XV of 1877 (Limitation

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Act) sch. ii, No. 179 (4) was intended to cover any application made according to law in furtherance of the execution proceedings under a decree. It includes applications made by a decree-holder under s. 258 of the Civil Procedure Code to enter up part satisfaction of the decree.

Per Mahmood, J.—Provided that the payment asserted in the application was actually made.

Sujan Singh *v.* Hira Singh 399

ACTS—1879—XVIII, ss. 27, 28, 29, 30. *Suit by pleader to recover fee from client—Agreement for fee—Agreement not in writing and filed in Court.*] Ss. 27, 28 and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to any arrangements or agreement made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation. They do not provide as to matters which relate to the opposite party, or the fees that he has to pay to the legal practitioner of the opposite party, but provide what, as between the pleader and his client, shall be the method in which certain special arrangements are to be entered into. They make provision for arrangements between pleaders and their clients, which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation; and were framed upon the principle which regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client. They were intended to protect necessitous, improvident or careless litigants, from being taken advantage of by unscrupulous legal advisers. *Rama* v. *Kunji* approved and followed.

Razi-ud-din *v.* Karim Bakhsh 169

———1881—XII, s. 9.. *See* Act XII of 1881, ss. 93*(b)*, 94, 206, *and* Occupancy tenant.

———, ss. 61, 83, 85, 86, 93 *(f)*. *See* Jurisdiction of Civil Court.

———, s. 93 (*h*), 209. *See* Lambardar and co-sharer.

———, ss. 93(*b*), 94, 206. *Mortgage of occupancy holding—Such mortgage not an "act inconsistent with the purpose for which the land was let"—Suit to eject mortgagee in possession—Jurisdiction of Civil Court—Appeal—Objection to jurisdiction not taken in first Court.*]—A mortgage of his holding by an occupancy tenant, under which the mortgagee obtains possession, is not an act "detrimental to the land" or "inconsistent with the purpose for which the land was let," within the meaning of s. 93(*b*) of the N.-W. P. Rent Act (XII of 1881). An act detrimental to the land means an act which injures the land itself. An act inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering the character of the land, as, for instance, turning it from agricultural land to building land.

But a mortgage with possession, whether the possession is given at the time of the granting of the mortgage, or is obtained later by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the N.-W. P. Rent Act.

A suit by the zamindar to eject the mortgagee of an occupancy holding or his representatives in possession, does not fall within ss. 93 *(b)* and 94 of the N.-W. P. Rent Act, but is cognizable by a civil Court under the rules of limitation applicable to suits in such Courts.

Under s. 206 of the N.-W. P. Rent Act, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction

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is not to be entertained in the appellate Court, but the Judge must try the case upon the facts, and apply the law applicable to those facts. *Debí Saran Lál* v. *Debi Saran Upadhia* approved.

Madho Lál *v.* Sheo Prasád Misr 419

ACTS—1881—XII, *ss.* 183, 199. *See* High Court's powers of revision.

————1882—IV, ss. 10, 12, *See* Act VI of 1882, s. 144 *(c)*.

————, s. 58. *See* Mortgage (1).

————, *ss.* 58*(d)*, 98. *See* Mortgage usufructuary, *and* Splitting claims.

————, s. 80. *See* Civil Procedure Code, s. 295, proviso (*c*).

————, s. 87. *Order absolute for foreclosure—Appeal—Execution of decree—"Decree"—Civil Procedure Code, ss.* 2, 244, *sch. iv, No.* 129.] The order mentioned in s. 87 of the Transfer of Property Act (IV of 1882) is an order in execution of the substantive foreclosure decree, and is appealable as a decree under s. 244 read with s. 2 of the Civil Procedure Code upon the stamp payable in respect of such orders.

So *held* by the Full Bench, EDGE, C. J., doubting.

Kedar Nath *v.* Lalji Sahai 61

————, ss. 88, 89. *Mortgage—Execution of decree—Conditional decree for sale not made absolute—Res judicata*]. A conditional decree for the sale of mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882) cannot be executed unless and until it is made absolute by an order passed under s. 89.

Where on a previous application being made for execution of such a conditional decree, the judgment-debtor did not appear to oppose the decree-holder's application for attachment and sale, but the application was dismissed for default of prosecution,—*held* that as the question whether the conditional decree was capable of execution before it was made absolute was never before in issue, and was not judicially treated on the occasion of the former application, there was no *res judicata* on the point.

Ram Lal *v.* Narain 539

————, s. 99. *See* Act XV of 1877, sch. ii, No. 179 (4).

————VI, s. 144 *(c)*. *Company—Winding up—Application by Official Liquidator for sanction to sale of Company's property—Lease—Covenant against assignment—Covenant not applying to assignments other than by act of parties—Act IV of* 1882 *(Transfer of Property Act), ss.* 10, 12.] The power of the Court under s. 144 *(c)* of the Indian Companies Act (VI of 1882) to give sanction to an Official Liquidator to sell the property of the Company, overrides a private contract against assignment made by the Company.

A covenant in a lease to a Company provided that the lessees should not "assign, underlet or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns." The Company having gone into liquidation, and the Official Liquidator having applied, under s. 144 *(c)* of the Indian Companies Act, for sanction to sell the Company's property, it was objected on behalf of the lessors' assigns that the proposed sale would be in contravention of the covenant.

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Held that the covenant did not apply to assignments by operation of law or assignments authorized by statute.

Ss. 10 and 12 of the Transfer of Property Act (IV of 1882) relate only to transfers by act of parties.

In the matter of the West Hopetown Tea Company, Limited ... 193

ACTS—1888—VII, s. 30. *See* Civil Procedure Code, s. 320.

ADOPTION—*Hindu Law.* *See* Possessory title.

————. *See* Hindu Law (2).

APPEAL. *Death of plaintiff-appellant—Rival applicants for substitution—Order under Civil Procedure Code, s. 367, substituting one applicant—No appeal from such order—Unsuccessful applicant attempting to appeal from final decree on appeal—Civil Procedure Code, s. 591—"Error, defect or irregularity, affecting the decision of the case."*] Pending an appeal before the lower appellate Court, the plaintiff-appellant died, and two persons separately applied to be substituted as the deceased's representative The Court, applying ss. 367 and 582 of the Civil Procedure Code, decided in favour of one of the applicants and brought him upon the record. No appeal was made against this order by the unsuccessful applicant. The lower appellate Court decided the appeal adversely to the successful applicant. Subsequently the unsuccessful applicant established by a separate suit that she was the deceased's legal representative, and that her opponent was not. She attempted to appeal to the High Court against the lower appellate Court's decree dismissing the appeal.

Held that the appellant, not having been a party to the decree below, and the order below having decided that she was not entitled to be a party to the proceedings of the lower appellate Court, she was not entitled to maintain the appeal to the High Court, and s. 591 of the Civil Procedure Code was not applicable to the case. *Har Narain* v. *Kharag Singh* distinguished.

Where an order under the group of sections in the Civil Procedure Code relating to representatives has been made excluding a person from the record, that person must seek his remedy by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands.

Error, defect or irregularity within the meaning of s. 591 of the Code means error, defect or irregularity in procedure or in law, and not in matters of fact. In the present case there was no error, defect or irregularity within the meaning of the section, and even if there were, it did not affect the decision of the case in appeal below.

Sankali *v.* Murlidhar 200

————*Objection to jurisdiction not taken in first Court.* *See* Act XII of 1881, ss. 93*(b)*, 94, 206, *and* Occupancy tenant.

————. *See* Act XV of 1877, ss. 5, 12.

————. *See* Act IV of 1882, s. 87, *and* Practice.

BURDEN OF PROOF. *See* Evidence.

————————. *See* Lambardar and co-sharer.

————————. *See* Undue influence.

CAUSE OF ACTION. *See* Splitting claims *and* Mortgage, usufructuary.

CHARGE. *See* Contribution.

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CIVIL PROCEDURE CODE, ss. 2,244, SCH. IV, No. 129. *See* Act IV of 1882, s. 87.

———————, s. 11. *See* Jurisdiction of Civil Court.

———————, s. 13. *See* Res judicata.

———————, s. 17. *Act IX of* 1861, *ss.* 1, 3, 4—*Jurisdiction*] An application was made to the District Judge of Allahabad, under s. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants, at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore.

Held that, under ss. 1, 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad, where the cause of action arose; and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application.

Sarat Chandra Chakarbati *v.* Forman 213

———————, *s.* 43. *See* Splitting claims *and* Mortgage, usufructuary.

———————, ss. 54, 56. *Plaint, rejection of.*] S. 54 of the Civil Procedure Code may be applied at any stage of a suit.

Kishore Singh *v.* Sabdal Singh 553

———————, ss. 54, 541, 582, 638. *See* Court-fee.

———————, s. 210. *See* Execution of decree (9).

———————, ss. 223, 228. *See* Second appeal.

———————, s. 230. *See* Execution of decree (9).

———————, s. 234. *See* Execution of decree (5).

———————, ss. 234, 276, 311, 312. *See* Execution of decree (7).

———————, s. 244 (*c*). *See* Execution of decree (3), (5).

———————, s. 248. *See* Execution of decree (5).

———————, s. 258. *See* Act XV of 1877, sch. ii, No. 179 (4), *and* Execution of decree (4).

———————, s. 278. *See* Execution of decree (5).

———————, s. 295, PROVISO (*c*). *Distribution of proceeds of execution-sale—Sale in execution of decree enforcing mortgage—Priority of mortgages—Act IV of* 1882 (*Transfer of Property Act*) *s.* 80]. A. mortgaged certain property to B. in July 1874, to C. in March 1877, and again to B. in November 1877. B. obtained a decree directing the sale of the property in satisfaction of his two mortgages, and it was sold accordingly. Subsequent to the sale, C. obtained a similar decree upon his mortgage, and having unsuccessfully applied in his own suit to have his decree satisfied out of the sale proceeds after payment of B's first mortgage of July 1874, brought a suit under the last paragraph but one of *s.* 295 of the Civil Procedure Code to recover the amount received by B in respect of B's mortgage of November 1877.

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Held that to read the words "an incumbrance" in s. 295, proviso (*c*) of the Civil Procedure Code as "an incumbrance or incumbrances," so as to give priority to B's mortgage of November 1877, over C's earlier mortgage of March 1877, would be to defeat the intention of the Legislature as expressed in that section and also in s. 80 of the Transfer of Property Act (IV of 1882); and that C. was entitled to maintain the suit.

Mitthu Lal *v.* Kishan Lal 546

CIVIL PROCEDURE CODE, s. 311. *See* Execution of decree (6), (7).

——————————, s. 315. *See* Execution of decree (8).

——————————, s. 320. *Transmission of decree to Collector for execution—Power of Local Government to make rules for regulating procedure of Collector—Rule providing for appeal from Collector to Commissioner not* ultra vires—*Rule No.* 17, *cl. XIX of* 12*th November* 1883—*Act VII of* 1888 (*Civil Procedure Code Amendment Act*) *s.* 30—*Act XIX of* 1873 (*N.-W. P. Land Revenue Act*), *s.* 243.] The authority conferred upon the Local Government by s. 320 of the Civil Procedure Code prior to the amendment of that section by s. 30 of the Civil Procedure Code Amendment Act (VII of 1888), to make rules for regulating the procedure of the Collector in executing decrees transmitted to him, included power to make a rule providing for an appeal from the Collector's orders.

Clause XIX of Rule 17 which was added to the Rules (No. 671 of 30th August 1880) published in the *N.-W. P and Oudh Gazette* of the 14th September 1880, by a notification in the Gazette of the 17th November 1883, and which made the order of a Collector confirming a sale appealable to the Commissioner of the Division, was therefore not *ultra vires* of the Local Government. *Madho Prasad* v. *Hansa Kuar* referred to.

S. 243 of the N.-W. P. Land Revenue Act (XIX of 1873) does not apply to such orders passed by a Collector.

Takaddus Fatima *v.* Baldeo Das 564

——————————, s. 325 (*j*). *See* Act XV of 1877, sch. ii, No. 179(4).

——————————, s. 341. *See* Act XV of 1877, sch. ii, No. 179(4).

——————————, ss. 373, 647. *See* Execution of decree (1). (2).

——————————, ss. 542, 587. *See* Act XV of 1877, ss. 4, 5, 12,

——————————, ss. 562, 564, 588 (28), 591. *Remand in contravention of s.* 564—*Remand and all subsequent proceedings illegal—Omission to appeal from remand order—Objection to order allowed on appeal from final decree.*] Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed,—*held* by the Full Bench that, with reference to ss. 562, 564 of the Civil Procedure Code, the lower appellate Court had no jurisdiction to remand the case under the former section, and that both the remand order and all proceedings subsequent thereto were *ultra vires* and illegal.

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Held further that the legality of the remand order and the subsequent proceedings could, under s. 591 of the Code, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under s. 588 (28).

Rameshur Singh *v.* Sheodin Singh 510

CIVIL PROCEDURE CODE, s. 579. *See* Act XV of 1877, ss. 5, 12, sch. ii, No. 170.

——————————, s. 586. *See* Second appeal.

——————————, s. 591. *See* Appeal.

——————————, s. 592. *See* Act XV. of 1877, ss. 5, 12, sch. ii, No. 170.

——————————, s. 622. *See* High Court's powers of revision.

COMPANY. *See* Act VI of 1882, s. 144 *(c)*.

CONFESSION. *See* Act I of 1872, ss. 74, 80.

CONTRIBUTION, SUIT FOR. *Joinder of parties—Joinder of causes of action—Limitation—Charge—Act XV of* 1877 *(Limitation Act), sch. ii, Nos.* 99, 120, 132] Where the owner of two villages sold under a decree obtained upon a mortgage, claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them all collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for contribution against the separate owners. *Hira Chand* v. *Abdal* distinguished. *Rajaput Rai* v. *Mahomed Ali Khan, Tavasi Telavar* v. *Palani Andi Telavar, Khetra Debia* v. *Kumola Kant Bukhshee* and *Eglinton* v. *Kaylashnath Mozoomdar* referred to.

He may also bring a single suit in respect of the two sales, and is not bound to bring a separate suit in respect of each sale.

The owners of the other villages included in the mortgage are liable to contribution; and the owner of the property sold is entitled to a charge on those other villages in respect of the several amounts to be contributed; and the suit for contribution is governed by the limitation provided by art 132 and not by that provided by art. 99 or art 120 of sch. ii. of the Limitation Act (XV of 1877) and must be instituted within twelve years from the date of confirmation of the sale. *Ram Dutt Singh* v. *Horakh Narain Singh* and *Pancham Singh* v. *Ali Ahmad* referred to.

Ibu Husain *v.* Ramdai 110

COURT-FEE—*Memorandum of appeal insufficiently stamped—Conditional order admitting appeal—Deficiency made good after period of limitation—Act VII of* 1870 *(Court-fees Act), ss.* 4, 5, 6, 9, 10, 12, 28, 30—"*Finality*" *of taxing officer's decision as to court-fee—Civil Procedure Code, ss.* 54, 541, 582, 638—*Act XV of* 1877 *(Limitation Act), s.* 4—*Memorandum of appeal from decree granting two distinct declarations—Construction of statute—Practice of Court.*] An appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Limitation Act (XV of 1877) unless it is accompanied by the copies required by the Code.

A memorandum of appeal is a document included in the first and second schedules to the Court-fees Act (VII of 1870), and is a document within the meaning of ss. 4, 25, 28 and 30 of the Act, and therefore cannot be filed or recorded in or received by the High Court unless and until

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the proper court-fee in respect of it is paid, and is of no validity unless and until it is properly stamped. Consequently, if it is not, when tendered, properly stamped, it is not at that time a memorandum of appeal within the meaning of s. 541 of the Code, and the appeal cannot be regarded as having been at that time presented within the meaning of s. 4 of the Limitation Act, or as valid for any other purpose, except in the events specified in s. 28 of the Court-fees Act.

When a memorandum of appeal which, when tendered, was insufficiently stamped has subsequently been sufficiently stamped, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation, unless it has been done by order made under the second paragraph of s. 28 of the Court-fees Act. In the case of a High Court such an order can be made only by a Judge, and by him only in cases "of mistake or inadvertence" These words mean mistake or inadvertence on the part of the Court or its officers, and not on the part of the appellant or his advisers. The expression "head of the office" in s. 28 does not refer to the head of the office of a Court, or at all events to the head of the office of a High Court, acting not as such but as a taxing officer; but it refers to the head of a public office such as the Board of Revenue.

Ss. 9, 10 and 11 of the Court-fees Act are not in conflict with s. 28; nor are ss. 9, 10, 11 and 28, read together, in conflict with s. 54 of the Civil Procedure Code. Cases within s. 10 or s. 11 of the Act would arise only where, through mistake or inadvertence of the Court, a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed or used in the Court; and clauses *(a)* and *(b)* of s. 54 of the Code are similarly related to s. 28 of the Act, and were not intended to cut down or limit its provisions. The "dismissal" of a suit under s. 10 or s. 11 of the Act has the same effect as that provided by s. 56 of the Code in the case of "rejection" of a plaint under s. 54.

Clauses *(a)* and *(b)* of s. 54, which are declared by s. 638 to be inapplicable to the original and civil jurisdiction of the High Court, are also inapplicable to its appellate jurisdiction, notwithstanding the provisions of s. 582.

The word "final" in s. 5 of the Court-fees Act has the same meaning as in s. 12, though it is applied to a different subject. The cases in which it has been held that, notwithstanding the use of this word in s. 12, an appeal lies from a decision as to the category in which the relief sought by a plainitff or appellant falls, do not mean that decisions which the section declares to be "final" are nevertheless appealable, but that the question of category is not a "question relating to valuation," and therefore is not declared by the section to be final. In both s. 5 and s. 12 "final" is used in its ordinary legal sense of unappealable. A decision under s. 5 of the Act is not open to appeal, revision or review, and is final for all purposes, and no means have been provided or suggested by the Legislature for questioning it.

The officer mentioned in s 5 of the Court-fees Act is not bound to advise parties as to the stamp required under the Act, or to give them notice that they have not sufficiently stamped documents which the Act requires to be stamped before presentation.

A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in a manner contrary to its plain wording. Nor can the principles of construction to be applied to an Act, be influenced by extraneous considerations, such as questions of hardship.

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A plaint contained a prayer for a declaration (i) that certain property was the joint property of the plaintiff, and (ii) that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions and want of title. The decree in the suit, passed on the 14th September 1887, granted both the declarations prayed for. The defendants appealed to the High Court against the whole decree, and stamped their memorandum of appeal with a stamp of Rs 10 only. On the 9th November 1887 it was tendered to a Judge for admission, and it then bore a report dated the 7th November by the officer appointed under s 5 of the Court-fees Act, "report will be made on receipt of record." The Judge made an order, "admit, subject to stamp report;" and the memorandum was then received by the office, and the appeal was entered on the register. On the 27th September 1888 the office reported that there was a deficiency in the stamp of Rs. 615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December 1888 it was made good At the hearing of the appeal a preliminary objection was taken that the appeal had never been validly presented within time, or admitted, and that it could not be heard.

Held that there was before the Court no valid appeal as to the merits of which the Court could give a decision.

Held also that the stamp of Rs. 10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection.

Balkaran Rai *v.* Gobind Nath Tiwari 129

"CO-SHARER." *See* Pre-emption.

————. *Dealing with joint property—Building by one co-sharer against the wish of others—Suit for injunction to restrain building—Discretion of Court—Act I of* 1877 *(Specific Relief Act)*, *s.* 54]. One of several co-sharers in a mahal having begun to erect certain kachcha buildings upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him on partition, and that on partition the plaintiff could not be adequately compensated.

Held by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time. *Paras Rám* v. *Sherjit* referred to.

Per Straight, J, that it was for the defendant-appellant to show that the lower appellate Court had exercised a wrong discretion in granting the injunction, and that, this not having been shown, the High Court ought not to interfere.

Shadi *v.* Anup Singh 436

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CRIMINAL PROCEDURE CODE, ss. 226, 227—*Power of Sessions Judge to withdraw a charge framed by him*]. The word "alter" in s. 227 of the Criminal Procedure Code includes withdrawal by a Sessions Judge of a charge added by him to the charge on which the commitment had been made.

Dwarka Lal *v.* Mahadeo Rai 551

——————, ss 349, 350. *Transfer of case by Subordinate Magistrate to District Magistrate—District Magistrate deciding on evidence taken by subordinate.*] S. 350 of the Criminal Procedure Code was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to have jurisdiction in that post, and is succeeded by another officer.

A subordinate Magistrate, having taken all the evidence for the prosecution and for the defence, sent the case to the Magistrate of the District, not on the grounds mentioned in s. 349 of the Criminal Procedure Code, and the District Magistrate, observing that none of the accused asked to have the witnesses reheard, gave judgment upon the evidence taken by the subordinate Magistrate. The Sessions Judge refused to interfere in revision with the District Magistrate's proceedings, on the ground that they were covered by s. 350 of the Code.

Held that this view was erroneous, that neither under s. 192 nor under s. 349 was there any transfer, to the District Magistrate by his subordinate, that s. 350 was inapplicable, and that the order passed by the District Magistrate must be quashed.

Queen-Empress *v.* Radhe 66

——————, s. 437. *Order of Sessions Judge rejecting application under s. 437—Subsequent order of District Magistrate granting similar application—Practice.*] Where a Sessions Judge has passed orders under s 437 of the Criminal Procedure Code, a District Magistrate acting under the same section should not pass orders of a contrary kind, but if he thinks that the Judge's orders were wrong, he should submit them to the High Court through the medium of the Pudic Prosecutor. *Queen-Empress* v *Sheve Singh* referred to.

Where a Sessions Judge had, under s. 437 of the Criminal Procedure Code, refused to order further inquiry into the case of an accused person who had been discharged, the High Court set aside a subsequent order of the Magistrate of the district passed under the same section and ordering further inquiry into the same case.

Queen-Empress *v.* Pirthi 434

CROSS-APPEALS. *See* Res judicata.

"DECREE." *See* Act IV of 1882, s. 87.

DISTRESS. *See* Jurisdiction of Civil Court.

DISTURBING A RELIGIOUS ASSEMBLY. *See* Muhammadan Law (2).

EJECTMENT. *See* Evidence.

EVIDENCE. *Burden of proof as to ownership—Possession—Suit for ejectment—Act I of* 1872 *(Evidence Act) s.* 110.] It is usually for the plaintiff who seeks ejectment to prove his title. But where he proves himself to have peaceably enjoyed possession for a considerable time, the person who has recently dispossessed him has to meet the presumption of law that the plaintiff's possession indicates his ownership.

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In a suit for possession of immoveable property and other reliefs, it was proved that the plaintiff and his predecessors in title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant. The defendant alleged, but failed to prove, that the plaintiff had paid him rent as tenant-at-will of the premises. The lower appellate Court, upon the finding that the plaintiff's possession was that of a licensee, modified the first Court's decree, which had allowed the claim in full.

Held, with reference to s. 110 of the Evidence Act, that although in the first instance the burden of proving his title was on the plaintiff, it was shifted by his proving long undisturbed possession; that the defendant's failure to prove the alleged payment of rent went far to prove that the plaintiff's possession was adverse; and that the Court below, in acting upon the theory that such possession was that of a licensee, had wrongly set up for the defendant a defence which he had not set up for himself.

Lachho *v.* Har Sahai 46

EVIDENCE. *Confession.* *See* Act I of 1872, ss. 74, 80.

——————— *See* Act I of 1872, ss. 8, 9, 13, 40, 43.

———————*Burden of proof.* *See* Lambardar and co-sharer.

EXECUTION OF DECREE. *Application for execution withdrawn by decree-holder—Rule in Sarju Prasad* v *Sita Ram explained—Civil Procedure Code, ss.* 373, 647.] The ruling in *Sarju Prasad* v. *Sita Ram*, only decided that where the circumstances in regard to an application for execution of decree show that it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder for execution is prohibited by s. 373 read with s. 647 of the Civil Procedure Code.

But where a Court of its own motion, and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution.

A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution, and upon the statement of the decree-holder's pleader "that at present the case may be struck off." No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code. *Sarju Prasad* v. *Sita Ram* explained and followed. *Ram Rup* v. *Lalji*, *Mahtab Kuar* v. *Sham Sundar Lal* and *Hira Singh* v. *Joti Prasad* distinguished.

Observations as to the necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits. Under s. 647 of the Civil Procedure Code, the provisions relating to proceedings in suits are to be followed and adopted in execution proceedings, so far as they may be fairly and properly applicable thereto.

Fakir-ullah *v.* Thakur Prasad 179

(2) ——————. *Application for execution withdrawn by decree-holder—Rule in Sarju Prasád* v. *Sita Rám—Civil Procedure Code,*

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ss. 373, 647—"*Suit*"—"*Appeal.*"] S. 647 of the Civil Procedure Code makes s. 373 applicable to proceedings in execution of decree. The words "suit" and "appeal" in s. 647 apply to suits and appeals in the strict sense of those terms, and were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal.

An application for execution of decree by arrest of the judgment-debtor was ordered by the Court to be struck off, upon the statement of the decree-holder's pleader that the judgment-debtor was in hiding, and that the decree-holder did not desire to prosecute the application further. At that time an order for a warrant of arrest had been issued subject to the payment of fees, but those fees had not been paid nor had the diet money been deposited, and no steps were taken to proceed with the application. No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held by the Full Bench that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code.

Sarju Prasád v. *Sita Rám* and *Fakir-ullah* v. *Thakur Prasád* approved and followed. *Bijai Singh* v. *Haiyat Begum* distinguished.

Radha Charan *v.* Man Singh 392

(3) EXECUTION OF DECREE. *Civil Procedure Code, s.* 244(*c*)—*Question for Court executing decree—Parties to the suit—Representative.*] After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages for wrongfully keeping him out of possession. The effect of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold and was purchased by the decree-holder; one of the judgment-debtors had died during the execution proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently this son sold his rights and interests in the property; and his vendee sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu widow, the defendant as purchaser could not acquire by the sale any rights superior to those of the widow; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff's vendor, and had thence passed to the plaintiff.

Held that the plaintiff's vendor was a party to the suit within the meaning of s. 244 (*c*) of the Civil Procedure Code, and that he not having objected to the sale in execution of the decree, neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution proceedings; and that the suit was barred by s. 244. *Ram Ghulam* v. *Hazaru Kuar* followed. *Bahori Lal* v. *Gauri Sahai* distinguished. *Mulmantri* v. *Ashfak Ahmad*, *Roop Lall Dass* v. *Bekani Meah* and *Ravunni Menon* v. *Kunju Nayar* referred to.

Raghubar Dial *v.* Hamid Jan 73

(4) EXECUTION OF DECREE. *Decree payable by instalments—Limitation—Waiver by decree-holder—Payment out of Court—Act XV of* 1877 (*Limitation Act*), *sch ii, No.* 179(6)—*Civil Procedure Code, s.* 258.] An application for execution of a decree payable by instalments was resist-

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ed by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards, and that the application was in time, having been made within three years from the date when the second instalment was due.

Held that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under s. 258 of the Civil Procedure Code, be recognized. *Sham Lal* v. *Kanahia Lal* and *Zahur Husain* v. *Bakhtawar* not followed.

Mitthu Lal v. Khairati Lal 569

(5) EXECUTION OF DECREE. *Question for Court executing decree—Appeal—Separate suit—Claim by legal representative to property as his own independently of deceased judgment-debtor—Jus tertii—Civil Procedure Code, ss* 234, 244 *(c)*, 248, 278.] Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under s. 244 (c) of the Civil Procedure Code must be determined in the execution department, and not by separate suit There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after, the decree Under the last paragraph of s. 234, the Court executing the decree may try and determine the question whether property in the legal representative's hands formed part of the deceased judgment-debtor's estate, and finds this fact for the purpose of bringing the property to sale in execution, and giving the auction-purchaser a good title under the sale; and the Court's order is subject to appeal but not to a separate suit under s 283.

Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor, he cannot set up a *jus tertii*, so as to come in under s. 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit.

So *held* by the Full Bench, Tyrrell, J., dissenting.

Held by Tyrrell, J., *contra*, that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge or satisfaction of the decree, but in his personal character independent of the suit and decree, and prefers a claim under s. 278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings.

Observations by Straight, J., as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as

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practicable, in accordance with the same procedure as that adopted in regular suits.

Rajrup Singh v. *Ramgolam Roy* approved. *Abdul Rahman* v. *Muhammad Yar* and *Awadh Kuari* v. *Ruktu Tiwari* overruled. *Bahori Lal* v. *Gauri Sahai* distinguished.

Seth Chand Mal *v.* Durga Doi 313

(6) EXECUTION OF DECREE. *Postponement of sale in execution—Sale held through order for postponement not reaching the conducting officer—Material irregularity in conducting sale—Illegal sale—Civil Procedure Code, s.* 311.] The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale, and the sale was consequently held The judgment-debtor applied to have the sale set aside as void.

Held that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed ; that his not being aware of the order was not material; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of s. 311 of the Civil Procedure Code ; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor ; and that the Court could not confirm the illegal sale, but must hold it to be void. *Sukhdeo Rai* v. *Sheo Ghulam*, *Ram Dial* v. *Mahtab Singh* and *Ganga Prasad* v. *Jag Lal Rai*, referred to.

Sant Lal *v.* Umrao-un-nissa 96

(7) ——————————. *Death of judgment-debtor after attachment but before sale in execution—Subsequen tsale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code, ss.* 234, 276, 311, 312] S 234 of the Civil Procedure Code applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life-time, and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force an attachment of property made in the judgment-debtor's lifetime. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damnified by the sale, his remedy is by application under s. 311 of the Code.

So *held* by the Full Bench, Mahmood, J., dissenting.

Where, subsequent to the attachment of immoveable property in execution of a simple money decree, the judgment-debtor died, and the property was then sold, without making the legal representatives of the judgment-debtor parties to the sale proceedings,—*held* by the Full Bench (Mahmood, J., dissenting) that the sale was regular and valid notwithstanding such omission. *Ramasani Ayyangar* v. *Bagirathi Ammal* dissented from.

Held by Mahmood, J., that on the principal of *audi alteram partem*, and because the rules provided by the Civil Procedure Code for suits should, under s. 647, be applied to execution proceedings (those

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proceedings including and terminating in the sale), the omission to make the legal representatives of the judgment-debtor parties to the sale proceedings was an irregularity; but that such irregularity would not invalidate the sale without proof of substantial injury within the meaning of s. 311; and that as in the present case no such substantial injury was either alleged or proved, the sale was valid.

Held also by Mahmood, J., that a person claiming by title paramount to or independent of the judgment-debtor is within the meaning of s. 311 of the Code. *Asmut-un-nissa Begum* v. *Ashruff Ali* dissented from. *Abdul Huq Mazoomdar* v. *Mohini Mohun Shaha* followed.

Sheo Prasad *v.* Hira Lal 440

(8) EXECUTION OF DECREE. *Sale of immoveable property set aside—Order refusing refund of price to purchaser—No appeal from such order—Civil Procedure Code, s.* 315.] No appeal lies from an order refusing a refund of price to a purchaser the sale to whom has been set aside under s. 315 of the Civil Procedure Code. *Soudagar Mal* v. *Abdul Rahman Khán, Tapesri Lál* v. *Deoki Nandan Rai* and *Rám Dial* v. *Rám Das* referred to. *Baijnath Sahai* v. *Moheep Narain Singh* dissented from.

Rahim Bakhsh v. Dhuri 397

(9) ——————————. *Transfer of decree for execution—Agreement for satisfaction of judgment debt by instalments—Civil Procedure Code, ss.* 210, 230, 257*A—Act XV of* 1877 (*Limitation Act*), *sch ii, No.* 179.] A simple money decree was passed in 1871, and was transferred to another Court for execution, and in June 1882 an application was made for execution; and, shortly afterwards, the Court to which the decree had been transferred sanctioned an agreement between the parties for satisfaction of the decree by instalments. In June 1885, an application was made to the Court which passed the decree to again transfer it for execution, and this application recited the previous agreement and certain payments which had been made, and it was granted. A further application for execution for the remaining instalments was made in April 1888.

Held by Edge, C. J., that the Court to which the decree was transferred had no power in 1882, to sanction the agreement under s. 257A of the Civil Procedure Code; that if the order in June 1885, of the Court passing the decree were regarded as a sanction (which it would be very difficult to hold), that order nevertheless could not operate as one under s. 210 altering the decree; that if any decree in the case were capable of execution it was the decree of 1871, which had never been altered by a Court; and that inasmuch as a previous application for execution had been made in June 1882, that decree was dead, as well under s. 230 of the Code as under art. 179, sch. ii of the Limitation Act (XV of 1877).

Held by Straight, J., that the order of June 1885 was not, and could not be, an order sanctioning the agreement of June 1882, and the decree consequently stood unaltered; and, an application to execute it having been made and granted since Act XIV of 1882 came into operation, the decree was now dead under s. 230 of the Code.

Per Edge, C. J.—The Court to which a decree has been transferred for execution has no power to sanction an agreement under s. 257A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by the Court which passed the decree.

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An agreement sanctioned under s. 257A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under s. 210, though an order under s. 210 would operate as a sanction under s. 257A.

The decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as *e.g.*, by an order under s. 210.

Gandharap Singh *v.* Sheodarshan Singh 571

EXECUTION OF DECREE. *See* Civil Procedure Code, s. 295, proviso (*c*), *and* s. 320.

————————. *See* Second appeal.

————————. *See* Act XV of 1877, sch. ii, No. 179 (4), *and* Act IV of 1882, s. 87.

————————. *See* Act IV of 1882, ss. 88, 89.

FIDUCIARY RELATION. *See* Undue influence.

FORECLOSURE. *See* Act IV of 1882, s. 87.

HARBOURING AN OFFENDER. *See* Act XLV of 1860, s. 212.

HIGH COURT'S POWERS OF REVISION. *Civil Procedure Code, s. 622—Suit for arrears of rent—Decision of Collector on appeal from Assistant Collector—Act XII of* 1881, *ss.* 183, 199.] The High Court has no power to revise, under s. 622 of the Civil Procedure Code, an order passed by a Collector under s. 183 of the N.-W. P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. *Hur Pershad* v. *Lalu* distinguished.

Ram Dayal *v.* Ram Adhin 198

HINDU LAW—*Adoption.* *See* Possessory title.

(2) ————. *Benares school—Mitakshara—Adoption—Power of Hindu widow to adopt—Necessity of express authority of deceased husband—Maxim, quod fieri non debuit, factum valet.*] *Held* by the Full Bench that, according to the Benares school of Hindu Law, a Hindu widow cannot make a valid adoption to her deceased husband without his express authority; that an adoption actually made by her without such express authority is illegal and void; and that the maxim, *quod fieri non debuit, factum valet* is inapplicable to such an adoption.

Tulshi Ram *v.* Behari Lal 328

(3) ————. *Exclusion from inheritance—Idiocy—Madness*]. The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied.

The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endued with the business capacity to manage their affairs properly. *Tirumamagal Ammal* v. *Ramasvami Ayyangar*, distinguished.

Surti *v.* Narain Das 530

(4) ————. *Joint Hindu family—Money decree against father alone for his personal debt—Attachment of joint family property—Suit by sons to set aside attachment.*] Where in execution of a simple money decree obtained against the father only in a joint Hindu family in respect of a

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bond debt incurred by him personally, the decree-holders attached the whole of the joint family property, and before sale in execution took place the sons of the judgment-debtor objected to the attachment under s. 278 of the Civil Procedure Code, and, the objection having been disallowed, sued for a declaration that they were entitled to a share in the property and for its release from attachment,—*held* that the plaintiffs were entitled to impeach the attachment upon the ground that it affected interests which the decree could not touch and which therefore could not be attached under it, and that they were in a position to ask to have those interests exempted from the threatened sale in execution.

Ram Dayal *v.* Durga Singh 209

(5) HINDU LAW. *Joint Hindu family—Mortgage and decree thereon affecting joint family property—Mortgage effected by and decree passed against father only—Father's debt—Effect of mortgage and decree on son's rights and interests.*] Where a Hindu son is coming into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree, or affected by the sale certificate.

Beni Madho *v.* Basdeo Patak 99

(6) ——————. *Hindu widow—Maintenance*] In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and status of the widow, and the expenses involved by the religious and other duties which she has to discharge. *Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nath Mullick* and *Narhar Singh* v. *Dirgnath Kuar* referred to.

Per Mahmood, J.—The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only a "starving allowance" The austerities enjoined upon Hindu widows are matters not of legal obligation, but only of moral injunction, and cannot be enforced by Courts of justice The Courts should bear in mind that Hindu widows are by ancient custom debarred from remarriage, and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality.

Baisni *v.* Rup Singh 558

HINDU WIDOW—*Adoption.* *See* Hindu Law (2).

——————. *See* Hindu Law (6).

IDIOCY. *See* Hindu Law (3).

INJUNCTION. *See* Co-sharers.

JOINDER. *See* Contribution.

JOINT HINDU FAMILY. *See* Hindu Law (4), (5).

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JUDICIAL OFFICERS, LIABILITY OF. *See* Act XVIII of 1850.

JURISDICTION OF CIVIL COURT. *Civil Procedure Code, s.* 11—*Act XII of* 1881 *(N.-W. P. Rent Act), ss.* 61, 83, 85, 86, 93, *(f)—Distress —Suit for declaration of proprietary title in property said to have been wrongfully distrained.*] In execution of a decree against the tenants of certain zamíndárs, the plaintiff attached and sold certain trees upon the holding of the judgment-debtors, and the auction-purchaser in turn transferred them to the plaintiff, who obtained possession. Subsequently, one of the judgment-debtors vacated the land on which the trees were situate, and the zamíndárs let the land to another tenant. This last-mentioned tenant having fallen into arrears of rent, the zamíndárs, purporting to act under s. 56 of the North-Western Provinces Rent Act (XII of 1881) distrained some of the trees of which the plaintiff was in possession under his purchase, sold them, and themselves bought them. The plaintiff then brought a suit against the zamíndárs, paying for a declaration of his right to and maintenance of possession of the trees.

Held that the plaintiff was entitled, under s. 11 of the Civil Procedure Code, to bring the suit in a civil Court, and that the civil Courts were not prevented from taking cognizance of it by ss. 83, 85, 93 *(f)* or any other provision of the North-Western Provinces Rent Act (XII of 1881).

Shankar Sahai *v.* Din Dial 409

JURISDICTION. *See* Civil Procedure Code, s 17.

"————————." *See* Act XVIII of 1850.

LAMBARDAR AND CO-SHARER. *Suit by recorded co-sharer for profits — Claim for profits not collected in consequence of defendant's negligence or misconduct —Jamabandi —Evidence—Burden of proof—Act XII of* 1881 *(N.-W. P. Rent Act). ss.* 93 *(h)*, 209—*Act I of* 1872 *(Evidence Act) s.* 106.] In a suit under s. 93 *(h)* of the N.-W. P. Rent Act (XII of 1881), by a recorded co-sharer against a lambardár for his recorded share of the profits of a mahál, in which the plaintiff seeks to make the defendant liable under s. 209, not only for the profits which the latter has actually collected, but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. No general rule can be laid down as to the quantum of evidence which the plaintiff in such a case must give in order to shift the burden of proof on to the defendant. The mere production by the plaintiff of the *jamabandi* or rent-roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. S. 106 of the Evidence Act (I of 1872) does not apply to such a case.

So *held* by the Full Bench, Mahmood, J., dissenting.

Held by Mahmood, J., *contra*, that the production of the *jamabandi* by the plaintiff in a case where he claims his share of the profits according to the *jamabandi* and the lambardár-defendant pleads that the actual collections fell short of the *jamabandi*, established a *primâ facie* presumption in favour of the plaintiff so as to throw upon the defendant, with reference to s. 106 of the Evidence Act, the necessity of proving circumstances which rendered it impossible for him to collect the profits according to the *jamabandi*.

Muhammad Inayat Husain *v.* Muhammad Karamat-ullah ... 301

LEASE. *See* Act VI of 1882, s. 144 *(c)*.

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MADNESS. *See* Hindu Law (3).

MAINTENANCE. *See* Hindu Law (6).

MAXIM, QUOD FIERI NON DEBUIT, FACTUM VALET. *See* Hindu Law (2).

MINOR. *Custody—Guardianship—Act IX of* 1861, *ss.* 1, 3, 4—*Jurisdiction—Civil Procedure Code, s.* 17—*Act IX of* 1875 *(Majority Act), s.* 3 *Discretion of Court under Act IX of* 1861, *s.* 3.] An application was made to the District Judge of Allahabad, under s. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants, at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore.

Held that, under ss. 1, 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad, where the cause of action arose; and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application.

Under s. 3 of Act IX of 1875 (the Indian Majority Act) a person under the age of eighteen is a minor within the meaning of Act IX of 1861.

No such restriction as is imposed by s. 27 of Act XL of 1858, prohibiting the appointment of a guardian of any minor whose father is living and is not a minor, applies to persons applying under s. 1 of Act IX of 1861. Where the father of a minor was old and unable to work from age and weakness, and the minor's elder brother had been maintaining and educating the minor at his own expense,—*held* that, under the circumstances, the brother was competent to apply under s. 1 of Act IX of 1861, and to ask for a certificate of guardianship.

The words in s. 3 of Act IX of 1861, "and thereupon proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor," confer on the Court an absolute discretion to make an order as to custody or guardianship, or to refrain from making such an order where the circumstances do not call for such an order being made.

Where a minor Hindu over the age of sixteen, who had embraced Christianity and left the house of his elder brother by whom he had been maintained and brought up, appeared to be well able to take care of and provide for himself, and preferred to be left as he was, and had sufficient mental capacity to judge what was best for himself, the Court refused to make any order upon an application by the brother for his custody and guardianship.

Sarat Chandra Chakarbati *v.* Forman 213

MORTGAGE. *Hypothecation of "our zamíndári property"—Ascertainment of mortgagors' zamíndári interest at date of mortgage—Mortgage not void for uncertainty—Act IX of* 1872 (*Contract Act*), *s.* 29—*Act IV of* 1882 (*Transfer of Property Act*) *s.* 58.] A deed of simple mortgage described the mortgaged property as "our zamíndari property" (*zamíndári apni*), and gave no further specification or description. It was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two zamíndáris,

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Held that the words "our zamindári property" were sufficiently certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific zamíndári interest; and that the mortgage was therefore not void for uncertainty.

Kanhia Lal v. *Muhammad Husain Khan*, *Bishen Dayal* v. *Udit Narain*, *Ramsidh Pande* v. *Balgobind*, *Rae Manik Chand* v. *Behari Lal*, *Deqjit* v. *Pitambar*, *Tailby* v. *The Official Receiver*, and *Tadman* v. *D'Epineuil* referred to.

Shadi Lal *v.* Thakur 175

(2) MORTGAGE. *Foreclosure—Regulation XVII of* 1806, *s.* 8—*Notice of foreclosure—Notice not signed by Judge.*] *Held* that where the notice of foreclosure under s. 8 of Regulation XVII of 1806 was signed not by the Judge but only by the Munsarim, the foreclosure proceedings were void *ab initio.*

Held also that the notice which was upon the record of the foreclosure proceedings and bore the mortgagor's signature must be regarded as the original notice in the matter; and that the acknowledgment of receipt of notice by the mortgagor did not cure the inherent defect of its non-signature by the Judge.

Hanuman Saran Singh *v.* Bhairon Singh 189

(3) ————. *First and second mortgages—Purchase of mortgaged property by first mortgagee—Suit by second mortgagee for sale—Plaint denying or ignoring title of first mortgagee—Suit to be dismissed*]. Where a second mortgagee coming into Court and denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee. *Raghunath Prasad* v. *Jurawan Rai*, referred to.

Salig Ram *v.* Har Charan Lal 548

(4) ————. *Second mortgage of the same property to the same person—Sale in execution of decree on first mortgage—Purchase by mortgagee decree-holder*]. A decree-holder holding two decrees of different Courts on separate bonds hypothecating the same property, in execution of the first decree purchased the property himself. The surplus of the sale proceeds was distributed by the Court among other persons who held money decrees against the same judgment debtor

Held that the decree-holder could not afterwards execute the second decree against property of the judgment-debtor not included in the hypothecation bond. *Ahmad Wali* v. *Bakar Hussain*, *Khwajah Bakhsh* v. *Imaman*, and *Babu Ranji* v. *Ramji Svarupji*, referred to.

Ballam Das *v.* Amar Raj 537

————, USUFRUCTUARY. *Act IV of* 1882 (*Transfer of Property Act*), *ss.* 58 (*d*), 98—*Splitting claims—Suit by usufructuary mortgagee excluded from possession for unpaid interest—Cause of action—Subsequent suit for principal and residue of interest barred—Civil Procedure Code s.* 43.] A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain, that certain interest should be payable, that the mortgagee should have possession, that the profits should be appropriated first

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in lieu of yearly interest and any balance appropriated in payment of the principal debt, and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal together with the residue of interest up to the date of suit.

Held that, inasmuch as there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage money, the instrument did not strictly fall within s. 58(*d*) of the Transfer of Property Act (IV of 1882), and that the rights and liabilities of the parties must be determined in accordance with the principles enunciated in s. 98 of that Act.

Held upon the construction of the instrument, that it must be regarded as a usufructuary mortgage not only during the four years, but after their expiration.

Held that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered; that the cause of action to recover the principal accrued at the same time and was the same cause of action; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal; and that the present suit was consequently barred by s. 43 of the Civil Procedure Code.

Hikmatulla Khan *v.* Imam Ali 203

MORTGAGE. *See* Act XII of 1881, ss. 93*(b)*, 94, 206, Occupancy tenant, *and* Vendor and purchaser.

MOSQUE. *See* Muhammadan Law (2).

MUHAMMADAN LAW. *Inheritance—Sunni and Shia—Rules of descent—Evidence as to deceased having been a Sunni.*] A Muhammadan widow, who by birth was a Sunni, but whose deceased husband had been a Shia, had during her married life conformed outwardly to his religion. The Sunni and Shia rules of inheritance differing, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death.

The evidence relating to the period after her husband's death led to the conclusion that throughout her widowhood she was a Sunni, having returned to the religion of her youth when freed from the necessities of her position as the wife of a Shia.

Hayat-un-nissa *v.* Muhammad Ali Khan 290

(2) ——————————. *Mosque not capable of dedication or exclusive appropriation to particular sect—Muhammadans—Muhammadi or Wahabi sect—Disturbing a religious assembly—Right to say "Amin" loudly during worship.*] According to the Muhammadan Law, a mosque cannot be dedicated or appropriated exclusively to any particular school or sect of Sunni Muhammadans. It is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience. No one sect or portion of the Muhammadan community can restrain any other from the exercise of this right.

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Members of the Muhammadi or Wahabi sect are Muhammadans, and as such entitled to perform their devotions in a mosque, though they may differ from the majority of Sunni Muhammadans on particular points.

But any Muhammadan would commit a criminal offence who, not in the *bonâ fide* performance of his duties, but *malâ fide*, for the purpose of disturbing others engaged in their devotions, made any demonstration, oral or otherwise, in a mosque, and disturbance was the result.

So *held* by the Full Bench. *Queen-Empress* v. *Ramzan* referred to.

Per Mahmood, J.—According to the Muhammadan ecclesiastical law, the word "*Amin*" must be said and should be pronounced at the end of the prayer ending with *Sura-i-Fateha*; but there is no authority for holding that it should be pronounced in a loud or in a low tone of voice; and (provided no disturbance of the public peace is caused) a Muhammadan pronouncing the word loudly, in the honest exercise of conscience, commits no offence or civil wrong.

Ata-ullah *v.* Azim-ullah 494

MUHAMMADANS. *See* Muhammadan Law (2).

MUNSIF, JURISDICTION OF. *See* Partition *and* Act VI of 1871, s. 20.

OCCUPANCY TENANT. *Act XII of* 1881 *(N.-W. P. Rent Act), ss.* 9, 93*(b)*, 94, 206—*Mortgage of occupancy holding—Such mortgage not an "act inconsistent with the purpose for which the land was let"—Suit to eject mortgagee in possession—Jurisdiction of civil Court—Appeal—Objection to jurisdiction not taken in first Court.*] A mortgage of his holding by an occupancy tenant, under which the mortgagee obtains possession, is not an act "detrimental to the land" or "inconsistent with the purpose for which the land was let," within the meaning of s. 93(*b*) of the N.-W. P Rent Act (XII of 1881). An act detrimental to the land means an act which injures the land itself. An act inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering the character of the land, as, for instance, turning it from agricultural land to building land.

But a mortgage with possession, whether the possession is given at the time of the granting of the mortgage, or is obtained later by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the N.-W. P. Rent Act.

A suit by the zamíndár to eject the mortgagee of an occupancy holding or his representatives in possession, does not fall within ss. 93 (*b*) and 94 of the N.-W. P. Rent Act, but is cognizable by a civil Court, under the rules of limitation applicable to suits in such Courts.

Under s. 206 of the N.-W. P. Rent Act, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction is not to be entertained in the appellate Court, but the Judge must try the case upon the facts, and apply the law applicable to those facts. *Debi Saran Lál* v. *Debi Saran Upadhia* approved.

Madho Lál *v.* Sheo Prasád Misr 419

PARDANASHIN LADY. *Personal appearance in Court—Practice.*] Although there is no provision in the Criminal Procedure Code which protects pardanashin ladies from appearing in a Court of justice, nevertheless it is very undesirable to compel the attendance of such persons.

It cannot be admitted as a general principle that pardanashin ladies whose evidence is required in criminal trials are to be allowed to compel

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the Courts to examine them at some other place than the Court-house itself. *In the matter of the petition of Din Tarini Debi* and *in re Farid-un-nissa* referred to.

Where a Magistrate considered it necessary to take the evidence of a pardanashin lady, who objected to appear in Court, the High Court directed him to make arrangements so as to take her evidence either in an empty Court-room in the presence of himself, the accused, and the pleader for the prosecution, or, if no empty Court-room were available, in his own private room or some other room in the Court building.

In the matter of the petition of Basant Bibi 69

PARTITION, SUIT FOR. *Claim for partition of share less than Rs.* 1,000 *in family property exceeding Rs.* 1,000—*Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 20—"*Subject-matter in dispute*"—*Jurisdiction of Munsif—Decree for partition of defendants' shares inter se*]. In a suit instituted in the Court of a Munsif by a member of a Muhammadan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs. 1,000, and the value of the whole family property exceeded Rs. 1,000. The lower appellate Court decreed partition not only of the plaintiff's share, but also of the shares of the defendants *inter se*, though such partition was not asked for.

Held that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871), was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Tydinatha* v. *Subrhmanaya*, *Kirty Churn Mitter* v. *Aunath Nath Deb*, *Shaikh Khoorshed Hossein* v. *Nubbee Fatima*, and *Ram Chandra Narayan* v. *Narayan Mahadev*, distinguished.

Held also that the lower appellate Court had no jurisdiction to partition as amongst the defendants the residue of the property left after the partitioning off of the plaintiff's share.

Hikmat Ali *v.* Wali-un-nissa 506

PLAINT, REJECTION OF. *See* Civil Procedure Code, ss. 54, 56.

POSSESSION. *See* Evidence.

POSSESSORY TITLE. *Possession of and partition between co-widows of estate left by their deceased husband—Attempted adoption of sister's son by a Brahman.*] Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had before his death adopted a son, to whom, also, by will, he bequeathed his estate. The adopted son died soon after the testator.

Held, that the widows had a possessory title or interest in the estate notwithstanding that a preferable title might exist in others through the deceased legatee: also, the estate, being jointly held by them, was partible, and that either widow might maintain a suit for partition.

The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would probably have had little difficulty in accepting the opinion of the High Court that a Brahman cannot lawfully adopt his sister's son.

Sundar *v.* Parbati 51

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PRACTICE. *Appeal wrongly presented as appeal from order—Such appeal not to be converted into appeal from decree.*] Where an appeal has been erroneously presented to the High Court as a first appeal from order, the Court will not convert it into a first appeal from a decree under s. 244 read with s. 2 of the Civil Procedure Code.

Kedar Nath *v.* Lalji Sahai 61

————. *Suit for exclusive possession of property—Court competent in such suit to decree joint possession.*] Where the plaintiff claimed exclusive possession of immoveable property to which the defendant also claimed to be exclusively entitled,—*held* that the Court was competent, upon the finding that the property belonged to the parties jointly, to give the plaintiff a decree for joint possession. *Wali-ullah Khan* v. *Muhammad Israr-ullah Khan* distinguished.

Wahid Alam *v.* Safat Alam 556

———— OF COURT. *See* Court-fee.

————*Revision.* *See* Criminal Procedure Code, s. 437.

————. *See* Criminal Procedure Code, ss. 349, 350, *and* Pardahnashin lady.

PRE-EMPTION. *Decree for pre-emption—Profits of property accruing between sale and decree becoming final*] In a suit for pre-emption based on the *wajib-ul-arz* of a village, the plaintiff pre-emptor did not ask for a declaration that he was entitled to be treated as a purchaser from the date of the sale to the vendees, defendants, nor that he was entitled to the rents and profits as from the date of the sale, nor did he ask for mesne profits. The decree in his favour did not grant him any such relief. The *wajib-ul-arz* was silent as to whether the purchaser or the pre-emptor was entitled to the profits accruing subsequently to the date of the sale being avoided.

Held by the Full Bench that the decree merely avoided the sale and divested the original owners of all interest in the property as from the date when the decree became final by the payment, in accordance with its terms, by the pre-emptor of the pre-emptive price decreed, and vested in the pre-emptor the rights of ownership from that date, and his rights were not postponed until he had obtained possession of the property.

Held that the profits of the property which accrued between the date of the sale and the date when the pre-emptor, in accordance with the decree, paid the decreed pre-emptive price, belonged not to the pre-emptor, nor to the original vendor, but to the original vendees.

Held by MAHMOOD, J., that the vendees-defendants were entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree.

Observations by Mahmood, J., upon the texts of the Muhammadan Law applicable to the case by way of analogy; upon the contention that there is a Hindu Law of pre-emption applicable to Hindus under s. 37 of the Bengal Civil Courts Act (XII of 1887; and upon the relation of the Muhammadan Law to cases in which pre-emption is claimed on the basis of contract or custom embodied in the *wajib-ul-arz* of a village.

Deokinandan *v.* Sri Ram 234

————. *Wajib-ul-arz—"Co-sharer"—Purchaser of isolated plot of land in mahál—Purchaser of sir land.*] The *wajib-ul-arz* of a vil-

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lage gave a right of pre-emption to "co-sharers in the mahál." One of the co-sharers brought a suit for pre-emption which the vendee-defendant resisted on the ground that he also was a co-sharer in the mahál, and the plaintiff had therefore no preferential right. This contention was based on a former purchase by the defendant under a deed of sale executed by a co-sharer, and comprising (i) an isolated plot of land in the mahál, (ii) sír lands in the mahál.

Held by the Full Bench that, it being found that the vendee defendant had already become a co-sharer in the mahál prior to the date of the purchase which was in question in the suit, the plaintiff had no preferential right of pre-emption.

Per Mahmood, J.—The decisions of the Full Bench in *Niamat Ali* v. *Asmat Bibi* and *Sital Prasád* v. *Amtul Bibi* have overruled *Hazari Lál* v. *Ugrah Rai* and *Rup Rám* v. *Mangni*.

Safdar Ali *v.* Dost Muhammad 426

PRE-EMPTION. *Muhammadan Law—Shias—Property owned by more than two co-sharers*] The prevalent doctrine of the Muhammadan Law governing the Shia sect is that no right of pre emption exists in the case of property owned by more than two co-sharers. *Shaikh Daim* v. *Asooha Beebe* and *Tafuzzul Husain* v. *Hadi Hasan* dissented from.

Abbas Ali *v.* Maya Ram. 229

PRINCIPAL AND AGENT. *See* Act XV of 1877, sch. ii, No. 89.

QUESTION FOR COURT EXECUTING DECREE. *See* Execution of decree.

REGULATION XVII OF 1806, s. 8. *See* Mortgage (2).

REMAND. *See* Civil Procedure Code, ss. 562, 564, 588 (28), 591.

RES JUDICATA *Civil Procedure Code, s. 13—Cross-appeals—Finding in appeal first heard barring trial of same issue in appeal subsequently heard.*] The plaintiff and defendant in a suit each appealed separately, and defendant's appeal first came on for hearing, and an issue as to whether the plaintiff or the defendant had title to the land in dispute was decided on the facts by the appellate Court adversely to the defendant. Subsequently, the plaintiff's appeal, involving the same issue, came on for hearing before the same Court.

Held that although s. 13 of the Civil Procedure Code did not apply, still the principal of *res judicata* applied, and the finding on the former appeal barred the trial of the same issue in the latter. *Ram Kirpal* v. *Rup Kuari* referred to.

Ram Lal *v.* Chhab Nath 578

———————. *See* Act IV of 1882, ss. 88, 89.

REVIEW OF JUDGMENT. *See* Act VII of 1870, ss. 6, 28, sch. i, Nos. 4, 5, *and* Act XV of 1877, s. 5, sch. ii, No. 173.

SALE. *See* Vendor and purchaser.

SECOND APPEAL. *Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Civil Procedure Code, ss. 584, 586*] For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree

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was passed, and not merely the actual amount affected by the order sought to be appealed.

Therefore where execution was applied for in the Munsif's Court in respect of a sum of Rs. 422-14-0, the value of the matter in dispute in the original suit (which was of the nature cognizable by a Court of Small Causes) having been above Rs. 500, and the Munsif's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court.

Held that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge.

Nazar Husain *v.* Kesri Mal 581

SECOND APPEAL. *Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Transfer of decree—Civil Procedure Code, ss.* 223, 228, 586.] Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. *Nazar Husain* v. *Kesri Mal* approved.

Harakh *v.* Ram Sarup 579

SHIAS. *See* Pre-emption *and* Muhammadan Law.

SIR-LAND. *See* Pre-emption.

SPLITTING CLAIMS. *Suit by usufructuary mortgagee excluded from possession for unpaid interest—Cause of action—Subsequent suit for principal and residue of interest barred—Civil Procedure Code, s.* 43.] A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain; that certain interest should be payable; that the mortgagee should have possession; that the profits should be appropriated first in lieu of yearly interest and any balance appropriated in payment of the principal debt; and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal, together with the residue of interest up to the date of suit.

Held that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered; that the cause of action to recover the principal accrued at the same time and was the same cause of action; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal; and that the present suit was consequently barred by s. 43 of the Civil Procedure Code.

Hikmatullah Khan *v.* Imam Ali 203

STATUTES, CONSTRUCTION OF. *Distinction between affirmative commands and negative prohibitions—Irregularities and illegalities.*] As

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a principle of the interpretation of statutes, a distinction must be drawn between cases in which a Court or an official omits to do something which a statute enacts shall be done, and cases in which a Court or an official does something which a statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and therefore without jurisdiction.

Rameshur Singh *v.* Sheodin Singh 510

STATUTES, CONSTRUCTION OF. *See* Court-fee.

SUIT FOR CANCELLATION OF INSTRUMENT. *See* Undue influence.

——— EXCLUSIVE POSSESSION OF PROPERTY. *See* Practice.

SUIT TO RECOVER COSTS BY WAY OF DAMAGES. *Costs incurred in prosecuting case in Criminal Court.*] *Held* that a suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a criminal Court.

Fazal Imam *v.* Fazal Rasul 166

SUNNIS. *See* Muhammadan Law.

UNDUE INFLUENCE. *Suit for cancellation of instrument—Act I of* 1877 *(Specific Relief Act), s.* 39—*Fiduciary relation—Gift to spiritual adviser—Burden of proof—Act I of* 1872 *(Evidence Act), s.* 111.] In a suit under s. 39 of the Specific Relief Act (I of 1877) for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a *Chatri* by caste, well advanced in years, and the defendant was his *guru* or spiritual advisor, a Brahman held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendant recite the holy book called Bhagwat. Almost immediately after execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud.

Held that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it, and the principle recognised by s. 111 of the Evidence Act (I of 1872), the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof the plaintiff was entitled to obtain cancellation of the deed. *Sital Prasad* v. *Parbhu Lal*, referred to.

Mannu Singh *v.* Umadat Pande 529

VENDOR AND PURCHASER. *Sale, with right reserved of repurchase within a period, distinguished from mortgage—Construction of documents of sale and of agreement for re-sale.*] A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage. *Alderson* v. *White* referred to and followed, the law of India and of England being the same on this point.

Bhagwan Sahai *v.* Bhagwan Din 387

WAJIB UL-ARZ. *See* Pre-emption.